86-966

No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

HARRY E. BECK, JR., *et alia*,

Petitioners,

v.

COMMUNICATIONS WORKERS OF AMERICA *et alia*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT and APPENDIX

EDWIN VIEIRA, JR.,
Counsel of Record
13877 Napa Drive
Independent Hill, Virginia 22111
(703) 791-6780

HUGH L. REILLY
National Right to Work Legal
Defense Foundation
8001 Braddock Road, Suite 600
Springfield, Virginia 22160
(703) 321-8510

Attorneys for Petitioners

Of Counsel.

JOSEPH J. HAHN
Arvey, Hodes, Costello
& Burman
One Eighty North La Salle Street
Chicago, Illinois 60601
(312) 855-5000

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QUESTIONS PRESENTED

I. Does Section 8(a)(3) of the National Labor Relations Act, the duty of fair representation, or the First Amendment to the United States Constitution preclude respondent Communications Workers of America and its affiliate local unions, acting as the exclusive representative of petitioner nonunion employees under color of Section 9(a) of that Act, from collecting "agency fees" from those employees without first having established a procedure that provides for: (a) *pre*-collection notice to the employees of the legal and factual bases for the fees, in terms of their relation to legitimate "collective-bargaining" activities of the union; (b) escrowing of any reasonably disputable portion of the fees; and (c) an expeditious hearing before an impartial decision-maker on the employees' objections to the union's proposed use of the fees held in escrow?

II. Does the injunction the District Court devised, and the Court of Appeals approved, to prevent the illegal exaction of "agency fees" from petitioner nonunion employees by respondent Communications Workers of America constitute a proper method for collecting and hearing employees' challenges to those fees; or does it amount to an illegal "rebate" scheme under this Court's ruling in *Ellis* v. *BRAC*, 466 U.S. 435 (1984), and otherwise fail to meet the procedural requirements for "agency-fee" arrangements this Court established in *Chicago Teachers Union, Local No. 1* v. *Hudson*, ____ U.S. ____, 106 S. Ct. 1066 (1986)?

PARTIES TO THIS PROCEEDING

In addition to Harry E. Beck, Jr., the following individuals were appellees and cross-appellants in the Court of Appeals, and are petitioners here: namely, Dorris R. Ambrose, Jacqueline S. Brandon, Mary Anna Cox, Sally B. DiMauro, Rue T.F. Downey, Kathleen A. Heil, John J. Hurley, Harriett Lipschultz, Clay B. Lutz, Barbara McGaughey, Ronald R. Merkle, Ethel T. Merryman, Doris J. Morrow, Marion F. Northrop, Frances M. Phyllis, Vivian Reedy, Barbara A. Russell, Lois A. Stallings, and Harry B. Schwartz, Sr.

In addition to the Communications Workers of America and its Locals 2100, 2101, 2108, and 2110, the following organizations were listed as defendants aligned with appellants and cross-appellees Communications Workers of America *et alia* in the Court of Appeals: namely, Communications Workers of America Local 2350, the AFL-CIO, the AFL-CIO Committee on Political Education, the Maryland State AFL-CIO, American Telephone & Telegraph Company, and the C & P Telephone Company of Maryland. Each of these organizations was a defendant in the District Court, where the case was dismissed or settled as to them. None of these organizations is a respondent here.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT and APPENDIX

INTRODUCTION

Harry E. Beck, Jr., *et alia* hereby petition this Court to issue a writ of certiorari to the United States Court of Appeals for the Fourth Circuit to review that court's decision and judgment in *Beck v. Communications Workers of America*, 776 F.2d 1187 (1985).

OPINIONS BELOW

The opinion of the panel of the Court of Appeals which is the subject of this petition is reported at 776 F.2d 1187, and is reprinted in the Appendix hereto (App.) at 29a. The further opinion of the Court of Appeals, sitting *en banc* on rehearing, is reported at 800 F.2d 1280, and is reprinted in App. at 1a.

The judgment and memorandum opinion of the District Court immediately preceding appeal to the Court of Appeals is unofficially reported at 114 L.R.R.M. 2523 and is reprinted in App. at 107a. The memorandum opinion of the District Court affirming the second report of the special master appointed by that court is unofficially reported at 112 L.R.R.M. 3069 and is reprinted in App. at 112a. The opinion of the District Court on review of the first report of the special master, remanding the case thereto for further determinations, is unofficially reported at 106 L.R.R.M. 2323 and is reprinted in App. at 127a. The memorandum and order of the District Court granting partial summary judgment to plaintiffs and referring the case to a special master is reported at 468 F. Supp. 93 and is reprinted in App. at 135a. The memorandum and order of the District Court denying defendants' motion to dismiss or stay pending exhaustion of internal union remedies is reported at 468 F. Supp. 87 and is reprinted in App. at 143a.

JURISDICTION

The Court of Appeals' panel entered its opinion and judgment on 24 October 1985. The Court of Appeals, sitting *en banc* on respondents' motion for rehearing, entered its opinion and judgment on 12 September 1986. This Court has jurisdiction under 28 U.S.C. §§ 1254(1) and 2101(c).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional and statutory provisions involved in this petition include the First Amendment to the United States Constitution; Sections 7, 8(a)(3), and 9(a) of the National Labor Relations Act, as amended, 29 U.S.C. §§ 157, 158(a)(3), and 159(a); and, by way of analogy, Sec-

tions 2, Fourth and 2, Eleventh of the Railway Labor Act, as amended, 45 U.S.C. §§ 152, Fourth and 152, Eleventh. The text of these provisions is reprinted in App. at 153a.

STATEMENT OF THE FACTS

Petitioners Harry E. Beck, Jr., *et alia* are nonunion employees of the C & P Telephone Company of Maryland who at all times material to this petition have been required, under color of Section 9(a) of the National Labor Relations Act,[1] to accept respondent Communications Workers of America (CWA) and certain of its affiliated local unions as their statutory "exclusive representative" for the purpose of collective bargaining with their employer over terms and conditions of their employment. As their exclusive representative, CWA negotiated with C & P Telephone an "agency-shop" agreement, requiring petitioners to pay CWA an "agency fee" equal to the full dues voluntary union members pay.

On 3 June 1976, petitioners filed suit in the United States District Court for the District of Maryland, seeking: (i) a determination under the United States Constitution and the National Labor Relations Act that the "agency-fee" agreement is unlawful to the extent it requires them to pay, and licenses CWA to collect and expend, more than their *pro rata* share of the demonstrable costs CWA incurs in performing legitimate collective-bargaining activities on their behalf; and (ii) appropriate injunctive relief.

On 12 January 1979, the District Court denied CWA's motion to dismiss or stay proceedings pending petitioners' exhaustion of an internal union "rebate" procedure,[2] holding that

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[1] 29 U.S.C. § 159(a).

[2] CWA's "rebate" scheme appears as an appendix to the District Court's memorandum and order, in App. at 151a.

(continued)

> a stay * * * would not be helpful in promoting the ultimate resolution of the controversy. * * * For one thing, it is not completely clear * * * that the union's rebate is procedurally or substantially adequate. The plaintiffs will almost certainly be dissatisfied with the Union's determination of the amount of dues-equivalent payments to be refunded, if for no other reason than that the CWA procedure * * * provides for no review by an impartial party.[3]

On 16 March 1979, the District Court granted partial summary judgment to petitioners, holding them "entitled to a declaratory judgment that exaction of fees for activities other than 'collective bargaining, contract administration and grievance adjustment' is improper, a decree ordering restitution of the amounts improperly collected by the union in the past, and an injunction against future collection of amounts * * * in excess of the amount necessary for the three enumerated purposes."[4] In its judgment, the court explicitly found that CWA "has collected and continues to collect from [petitioners] amounts beyond that allocable to collective bargaining, contract administration and grievance adjustment", and that "such collection * * * violates the first amendment rights of [petitioners]".[5] The court then referred the case to a special master to determine the amount of impermissible collections subject to restitution.

After comprehensive investigation of the matter, the special master disallowed some 79% of CWA's claim for

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In outline, the procedure offered a "refund of a portion of dues" to employees who affirmatively "object[ed] to the expenditure of * * * agency fees for activities or causes primarily political in nature" and submitted their objections to review by the union itself.

[3] App. at 148a-49a.

[4] *Id.* at 140a.

[5] *Id.* at 141a.

"agency fees" because CWA had failed to prove its expenditures attributable to "collective-bargaining" activities. In many instances, such as salaries of staff and other organization-wide costs of administration, the special master wholly disallowed expense-items that failed to identify the portion of the expenses allocable to bargaining.[6] But on review of the special master's findings by the District Court, CWA requested a remand "to present evidence * * * of modified bookkeeping procedures which would enable the unions to establish more accurately the percentage of expenditures" germane to "collective bargaining", and argued that "future injunctive relief should reflect this modified percentage figure".[7] Granting CWA's request, the District Court explained that

> [t]he injunctive relief regarding future collections should * * * be * * * flexible in order to accommodate possible changes in the unions' procedures. If at all possible, the final injunction should contain a self-executing procedure which will enable the allowable percentage figure [of the chargeable fee] to fluctuate in order to reflect current union spending policies. This procedure will avoid the necessity of locking the court into the role of overseeing the unions' activities on a permanent basis.[8]

The court then remanded the case to the special master, requesting him to submit additional findings on the following issues: namely,

> (1) Do the unions' current record-keeping policies in any way alter the factual findings previously submitted to the court?

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[6] Report of Wilson K. Barnes, Special Master, Beck v. Communications Workers of America, Civil No. M-76-839 (D. Md., filed 18 August 1980).

[7] Opinion of the District Court of 19 January 1981, in App. at 131a.

[8] App. at 132a.

> (2) If so, what method of computation would most accurately reflect the percentage of fees collected which are properly allocable to permissible activities?
>
> (3) In what manner, if at all, may this computation procedure be made self-executing in order to compensate for future changes in union policies?
>
> (4) How should the final injunction be framed in order to accomplish the objective set forth in this order and the prior orders in this action?[9]

After further extensive hearings, the special master determined that "the unions' current recordkeeping policies" did not alter the original determination that some 79% of CWA's claim for "agency fees" was not allowable, because those policies had not been applied to any actual figures purportedly showing CWA's expenditures. However, as a theoretical matter, the special master concluded that, subject to certain changes and additions,

> [t]he new system of CWA cost accounting, timekeeping and record-keeping * * * are, prima facie, a proper means for the CWA Defendants to seek to meet the burden of proof * * * for determining the percentage of agency fees * * * that is retainable by CWA and the percentage which is not retainable.[10]

The special master emphasized, none the less, that

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[9] *Id.*

[10] Supplemental Report of Wilson K. Barnes, Special Master, Beck v. Communications Workers of America, Civil No. M-76-839 (D. Md., filed 14 September 1981), at 51. On review of the special master's second report by the District Court, petitioners took exception to the special master's speculative language that CWA's new scheme was "a proper means for the CWA Defendants *to seek to meet* [their] burden of proof", because (absent testing on actual accounting data) the scheme remained purely theoretical, and its adequacy merely hypothetical and contingent. The District Court, however, noted that "[s]uch language is *dicta* and as such the court considers it, if erroneous, to be harmless". App. at 124a. Given the latter understanding of the matter, petitioners raised no further objections on this score.

[p]roper monitoring in addition to monitoring by regular employees of the CWA Defendants is a vital and important part of the proposed new system. * * *

Particularly in view of the involuntary nature of the payments to CWA by the Agency Fee Payors, the adversary nature of this compulsory relationship, and of the constitutional rights and issues involved, it is clear that there must be monitoring of the new system and its operations by a qualified organization, not part of the normal and usual operations of the CWA Defendants. * * * Although * * * any duly qualified outside organization which might be employed [by CWA] to perform the monitoring will necessarily be paid by the CWA Defendants, this type of monitoring will be as free of bias in favor of the CWA Defendants as can reasonably be expected. * * *

The monitoring and its results, supporting papers and data however should, before submission of the results obtained by the new system for the time period in question, be subject to consideration by counsel for the Plaintiffs and any experts selected by such counsel, who after such consideration, should have the right to object to any part of monitoring and its results, [and] within a reasonable time present these objections to the Court for its decision * * *.

* * * [I]t seems reasonable, fair and just * * * that, *inasmuch as the review by the Plaintiffs is an integral part of the monitoring process required by the new system, the CWA Defendants should pay the Plaintiffs the reasonable value of the services of their counsel and any expert selected by him, rendered in connection with their review of the above-mentioned monitoring process from time to time.*

> As the new proposed system of the CWA Defendants * * * indicates, *it cannot be self-executing but will require careful and frequent monitoring with the protections to the Plaintiffs above set forth.*[11]

The special master then proposed as a conclusion of law that petitioners

> are entitled to a permanent injunction restraining CWA * * * *from charging or collecting and from attempting to charge and collect from the Plaintiffs* * * * *the amount certified as non-retainable* by an independent Certified Public Accountant commissioned by the CWA Defendants who has used the new system of record-keeping and allocations designed by the experts of CWA * * *. The Plaintiffs through their counsel and an expert or experts selected by him shall have the right upon the issuance of such report to review the workpapers of the Certified Public Accountant and of the time recording and sampling expert who prepared the report, and who monitored the operation of the new system during the period involved. * * * The CWA Defendants shall each fiscal year hold in an interest-bearing escrow account a portion of the agency fees * * * equal to twice the amount determined in the previous fiscal year to be nonretainable pending the determination set forth above. *The CWA Defendants, as part of the monitoring expense for their new system, shall pay to the Plaintiffs an amount representing the reasonable value of the services of counsel and the experts of the Plaintiffs* in connection with the review from time to time as set forth above.[12]

On review of the special master's second report, and over petitioners' objections, the court held that "the form of injunction drafted by the Special Master is approp-

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[11] Supplemental Report, *ante* note 10, at 46-47, 48 (emphasis supplied).

[12] *Id.* at 51-52 (emphasis supplied).

riate", but went on to "conside[r] the changes proposed by [CWA], and finding them to be minor, reasonable, and just, [to] incorporate them into the permanent injunction".[13] Specifically, where the special master had proposed an injunction "restraining CWA * * * *from charging or collecting and from attempting to charge and collect* from the Plaintiffs * * * the amount certified as non-retainable", the District Court entered an injunction "permanently enjoin[ing CWA] *from retaining and from attempting to retain* from the plaintiffs * * * the amount certified as non-retainable".[14] That is, whereas the special master had found necessary a procedure that precluded *collection* of any "agency fee" not reasonably related to CWA's costs of "collective bargaining", the District Court substituted a procedure that allowed CWA initially to collect any fee it desired, subject only to a "rebate" of monies later determined to have been impermissibly collected in the first instance. In addition, where the special master had proposed an injunction requiring CWA *under all circumstances* to pay petitioners' reasonable costs "as part of the monitoring expense for [CWA's] new system", the District Court entered an injunction allowing petitioners the reasonable costs of monitoring only "[i]n the event that plaintiffs' review results in a determination that the amount initially certified as non-retainable * * * must be increased".[15]

Both CWA and petitioners appealed the District Court's judgment to the Court of Appeals, CWA claiming that neither the United States Constitution nor the National Labor Relations Act imposes any limitation on the size of the "agency fees" it chooses to extract from nonunion employees; and petitioners claiming that the

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[13] App. at 111a.

[14] *Id.* at 108a (emphasis supplied).

[15] *Id.* at 109a (emphasis supplied).

injunction the District Court framed amounts to the type of pure "rebate" scheme that this Court had earlier condemned in *Ellis* v. *BRAC*[16], licenses CWA to collect in whole or in part an "agency fee" to which it is not entitled, and renders prohibitively costly petitioners' participation in monitoring CWA's new accounting-procedures, thereby excising from those procedures an element necessary for the protection of petitioners' rights.

A panel of the Circuit Court affirmed the District Court on the issue of CWA's liability, on both statutory and constitutional grounds. However, the panel also affirmed the adequacy of the District Court's injunction. The panel conceded that "[t]he injunction allows CWA to charge [petitioners] the full amount of regular member dues subject to reduction by an amount an independent certified public accountant *later* determines to be non-retainable", but held this permissible under *Ellis* because, due to the requirement "for an interest-bearing escrow account which shall contain twice the amount determined in the previous fiscal year to be non-retainable", "CWA will derive no benefit from the amount determined to be nonretainable".[17] The panel then rejected petitioners' contention that "CWA should bear the cost of any challenge made to the amount determined to be non-retainable", on the theory that petitioners "simply ask for too much". Notwithstanding its own earlier explicit recognition that the District Court's injunction "allows

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[16] 466 U.S. 435 (1984).

[17] App. at 81a, 82a (footnote omitted) (emphasis supplied). Curiously, the panel cited as authority for this conclusion *Hudson* v. *Chicago Teachers Union, Local No. 1*, 743 F.2d 1187, 1197 (7th Cir. 1984), a decision later affirmed by this Court on grounds entirely at odds with the panel's reasoning. *See* Chicago Teachers Union, Local No. 1 v. Hudson, ____ U.S. ____, ____, 106 S. Ct. 1066, 1077-78 (1986).

CWA *to charge * * * the full amount* of regular member dues subject to [later] reduction", the panel stated that petitioners "have been granted an injunction prohibiting CWA from collecting amounts unrelated to CWA's duty to represent the employees in labor management relations".[18] Moreover, notwithstanding the District Court's limitation of petitioners' costs of monitoring the CWA accounting-system to a "reasonable value",[19] the panel opined that "[t]o burden CWA with the cost of any challenge to the non-retainable amount, *however frivolous*, would not only encourage meritless challenges but also unfairly burden the union's other dues-paying members".[20]

CWA then petitioned for rehearing *en banc*, on the issue of liability. The full Court of Appeals affirmed the panel.[21] CWA has petitioned this Court for a writ of certiorari to review the *en banc* judgment on the question of liability.[22] Petitioners now seek such a writ to review the panel's judgment on the remedy-issue.

REASONS FOR GRANTING THE WRIT

The District Court, with approval of the Court of Appeals, attempted to fashion "a self-executing procedure" that would limit CWA's collection of "agency fees" from nonunion employees such as petitioners to amounts properly allocable to the types of "collective-bargaining" activities permissible under the National Labor Relations Act: namely, negotiations, contract-administration, and grievance-processing. In so doing, the lower courts

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[18] *Id.* at 82a-83a.

[19] *Id.* at 108a.

[20] *Id.* at 83a (emphasis supplied).

[21] *Id.* at 1a.

[22] No. 86-637. Petitioners have filed a memorandum supporting CWA's petition as to the need for this Court's review.

correctly recognized the need for procedural protections for nonunion employees in the enforcement of "agency-fee" arrangements negotiated under color of Section 8(a)(3) of the Act. However, the lower courts adopted and approved what amounts in practice to a financially burdensome "rebate" scheme of the type this Court has condemned in private-sector employment under Section 2, Eleventh of the Railway Labor Act in *Ellis* v. *BRAC*, 466 U.S. 435 (1984), and in public-sector employment generally in *Chicago Teachers Union, Local No. 1* v. *Hudson*, ____ U.S. ____, 106 S. Ct. 1066 (1986).

The decision of the Court of Appeals thus raises for the first time in this Court the question of whether "agency-fee" arrangements negotiated under Section 8(a)(3) of the National Labor Relations Act are subject to procedural requirements parallel to those this Court has found necessary under the Railway Labor Act and various public-sector labor-relations laws.[23] Moreover, the decision of the Court of Appeals indirectly raises the question of whether an unified, truly national labor policy exists with respect to the rights and duties of nonunion employees, unions, and employers under "agency-fee" arrangements—either in the private sector itself (under the Railway Labor and National Labor Relations Acts) or in the private and public sectors (under the latter two acts together with similar

[23] In its petition for a writ of certiorari, CWA challenges the Court of Appeals' decision that "agency-fee" arrangements under that section are subject to the substantive limitation that the fees collected not exceed the union's demonstrable costs of "collective bargaining". CWA v. Beck, No. 86-637 (filed 27 October 1986). Together with CWA's petition, then, the instant petition provides this Court with its first opportunity to define both the substantive *and the procedural* requirements for "agency-fee" arrangements under Section 8(a)(3).

public-sector collective-bargaining statutes).[24]

I. Although this Court has established procedural guidelines for "agency-fee" arrangements in the private sector under Section 2, Eleventh of the Railway Labor Act and in the public-sector generally, it has never addressed the question of what procedural protections are available to nonunion employees under Section 8(a)(3) of the National Labor Relations Act.

Three great statutory schemes dominate labor-relations law in the United States: (i) the National Labor Relations Act (NLRA), covering the vast majority of private-sector employers in interstate commerce (other than in the transportation industries); the Railway Labor Act (RLA), covering a much smaller number of private-sector (and a few public-sector) employers in interstate transportation; and various state and local public-sector statutes, covering all public-sector employers, in jurisdictions mandating compulsory collective bargaining. In each area, the basic statutory structure is the same. The employer is required to negotiate and adjust employment-related grievances with a union designated as the exclusive representative of the employees; and nonunion employees are required to pay the union an "agency fee" (if the employer and union so agree).[25] In a series of cases beginning in 1956, this Court established that the

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[24] The practical urgency of this question lies in the conflict among the Circuit Courts of Appeals on the limitations *vel non* inherent in Section 8(a)(3). *Contrast* the Court of Appeals' decision here *with* Price v. UAW, 795 F. 2d 1128 (2d Cir. 1986) (Section 8(a)(3) licenses union to impose "agency fee" equal to full membership dues, with no limitation to "collective-bargaining" costs).

[25] *Compare* NLRA §§ 9(a) and 8(a)(3), 29 U.S.C. §§ 159(a) and 158(a)(3), *with* RLA §§ 2, Fourth and 2, Eleventh, 45 U.S.C. §§ 152, Fourth and 152, Eleventh, *and with* Abood v. Detroit Bd. of Educ., 431 U.S. 209, 223-26 (1977).

"agency-fee" provision of the RLA contains substantive limitations on the size of the fee a union may demand, and procedural limitations on how the union may collect the fee.[26] And beginning in 1977, the Court has similarly construed public-sector "agency-fee" arrangements.[27] However, although the Court has noted that the "regulatory scheme[s]" embodied in public-sector collective-bargaining laws are "broadly modeled after [the NLRA and RLA]", and that its decisions on the "agency-fee" provisions of the RLA are very influential if not strictly controlling precedents as to the legal parameters of public-sector "agency-fee" arrangements,[28] it has never passed on the substantive or procedural limitations of such arrangements under NLRA Section 8(a)(3). Thus, an important part of labor-relations law in the numerically most extensive area of employment in the United States remains undefined and, due to conflicting decisions of the Courts of Appeals, in a state of confusion.

The practical need for this Court to establish substantive and procedural limitations on "agency-fee" arrangements is no less, if it is not more, compelling under the NLRA than it was when this Court defined the reach of such arrangements under the RLA and public-sector statutes. No possible policy consideration militates against definitively settling the substantive and procedural requirements of NLRA Section 8(a)(3). And the opportunity now presents itself in the form of a case involving a complete factual record and detailed opin-

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[26] Railway Employes' Dep't v. Hanson, 351 U.S. 225 (1956); IAM v. Street, 367 U.S. 740 (1961); BRAC v. Allen, 373 U.S. 113 (1963); and Ellis v. BRAC, 466 U.S. 435 (1984).

[27] Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977); and Chicago Teachers Union, Local No. 1 v. Hudson, ____ U.S. ____, 106 S. Ct. 1066 (1986).

[28] Abood, 431 U.S. at 223-26.

ions at every stage of the trial and appellate processes.

II. Procedural protections for nonunion employees against misuse of "agency-fee" schemes by unions acting as exclusive representatives are logically implicit in Section 8(a)(3) of the National Labor Relations Act, as well as inherent in the unions' judicially mandated duty of fair representation, and compelled by the First Amendment to the United States Constitution.

The plain language of the Act requires that Section 8(a)(3) of the NLRA be interpreted and applied substantively to limit collection of "agency fees" to the demonstrable costs incurred by an exclusive representative in performance of its statutory "collective-bargaining" duties on behalf of nonunion employees. And from this substantive limitation, procedural requirements inexorably follow.

A. On its face, the NLRA explicitly confines to "collective bargaining" alone the activity a union may perform as the exclusive representative of nonunion employees. Section 7 of the Act declares that such employees have "the right to refrain" from all

> concerted activities for the purpose of collective bargaining or other mutual aid or protection * * * except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section [8(a)(3)] * * * .[29]

Section 8(a)(3), however, outlaws all compulsory-unionism "membership"-arrangements except where the "labor

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[29] 29 U.S.C. § 157.

organization is the representative of the employees as provided in section [9(a)]".[30] Section 9(a) stipulates that

> [r]epresentatives designated or selected *for the purposes of collective bargaining* by the majority of employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit *for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment* * * * .[31]

And Section 8(d) of the Act defines "collective bargaining" as the exclusive representative's

> obligation * * * to meet at reasonable times and confer [with the employer] in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached * * * .[32]

Coupled with this Court's recognition that Section 8(a)(3) itself has "whittled [compulsory union 'membership'] down to its financial core",[33] the statutory structure established in Sections 7, 8(a)(3), 8(d), and 9(a) of the Act compels the conclusion that the only "periodic dues and * * * initiation fees" an exclusive representative can demand from nonunion employees under color of Section 8(a)(3) are "agency fees" in the precise sense of the latter term: that is, fees representing the actual cost of the union's "agency", as the nonunion employees' exclusive representative, *for the purposes of "collective*

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[30] 29 U.S.C. § 158(a)(3).

[31] 29 U.S.C. § 159(a) (emphasis supplied).

[32] 29 U.S.C. § 158(d).

[33] NLRB v. General Motors Corp., 373 U.S. 734, 742 (1963).

bargaining" and those purposes only. And such has long been the consensus of the lower courts and commentators. [34]

B. The existence of a substantive limitation on the size of "agency fees" implies some procedural device adequate to the enforcement of that limitation; for the right to be free from the imposition of excessive "agency fees" is hardly meaningful apart from an effective "remedy" that redresses unavoidable violations of the right and forefends future wrongdoing. Again, however, the statute itself is the source, and indicates the parameters, of the necessary procedure.

In its enacting clause, Section 8(a)(3) flatly prohibits any arrangement that "encourage[s] * * * membership in any labor organization", as (obviously) an "agency-fee" scheme does. The section then contains two provisos. The first licenses "agency-fee" agreements *if* the union "is the [exclusive] representative of the employees as provided in section 9(a)"—thereby substantively limiting fees collectible under those agreements to the costs of "collective bargaining" incurred by the exclusive representative on behalf of the nonunion employees involved. The second proviso, moreover, qualifies and circumscribes the first, denying enforceability to any "agency-fee" scheme the employer "has reasonable grounds for

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[34] *See, e.g.*, Cantor, "Uses and Abuses of the Agency Shop", 59 *Notre Dame L. Rev.* 61, 61 & nn.1-2 (1983); T. Haggard, *Compulsory Unionism, the NLRB, and the Courts* (1977), at 34-75.

It is also possible to invoke the First Amendment to the United States Constitution and the duty of fair representation as legal predicates for this conclusion, as did the Circuit Court's panel majority, its *en banc* majority, and Judge Murnaghan in his concurring opinion on rehearing *en banc*. At this point, though, such further demonstrations merely carry owls to Athens. Enough it is to validate one sound basis for substantive limitations on Section 8(a)(3) "agency-fee" schemes.

believing" the union seeks to invoke against a nonunion employee "for reasons other than the failure of the employee to tender the periodic dues * * * required". Inasmuch as a union's demand that a nonunion employee pay an *excessive* "agency fee" is a "reason other than the failure of the employee to tender the periodic dues * * * *required*"—or, perhaps, "*permitted*" is the more descriptive verb—*under the statute*, the effect of the two provisos in tandem is to taint any "agency-fee" scheme with respect to which the employer has insufficient information to conclude in good faith that the fee reasonably reflects the costs of the union's "collective-bargaining" activities.[35] And, inasmuch as nonunion employees threatened with enforcement of an improper "agency-fee" scheme will certainly inform their employer of the absence of reasonable grounds to conclude that the fee is authorized under Section 8(a)(3), the practical result of the two provisos must be to require the exclusive representative, as a condition precedent to collection of any fee, to establish a procedure whereby it informs both the employer and his nonunion employees of the legal and factual bases for the fee, and provides for the hearing of those employees' objections by an impartial decision-maker.[36]

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[35] As this Court has recognized, because the union alone has access to the information supporting its claim for an "agency fee", the burden rests on it *ab initio* to disclose the facts necessary for the employer and nonunion employees to conclude that the union's claim is proper. Chicago Teachers Union, Local No. 1 v. Hudson, ____ U.S. ____, ____, 106 S. Ct. 1066, 1075-76 (1986). If the union discloses no or plainly insufficient facts, or simply asserts a naked demand for an "agency fee" unattended by any explanation of the calculation underlying the amount, both the employer and the nonunion employees have "reasonable grounds for believing" that the union cannot justify the "fee", and that therefore the "fee" is excessive (and unenforceable) under Section 8(a)(3).

[36] It is also possible to invoke either the duty of fair representation or the First Amendment to arrive at the same result. For example, if Section 8(a)(3) substantively limits an "agency fee" to the union's documentable

(continued)

In sum, Section 8(a)(3) requires unions seeking to impose "agency fees" on nonunion employees to establish procedures insuring that the collection of such fees will be strictly limited to the demonstrable costs the unions have incurred in "collective bargaining" on the employees' behalfs.

III. The injunction the Court of Appeals approved sanctions the type of "rebate" scheme this Court disapproved in *Ellis* v. *BRAC*, 466 U.S. 435 (1984), and otherwise fails to meet the procedural requirements for "agency-fee" arrangements this Court established in *Chicago Teachers Union, Local No. 1* v. *Hudson*, ____ U.S. ____, 106 S. Ct. 1066 (1986).

Throughout the proceedings below, petitioners attempted to convince the District Court and the Court of Appeals that a proper injunction in this case should: (i) absolutely preclude CWA from improperly expending any "agency-fee" monies; (ii) limit collections of "agency fees" to amounts reasonably related to CWA's demonstrable costs of "collective bargaining" on petitioners' behalfs; (iii) escrow any reasonably disputed fees, pending appropriate determination of their validity *vel non*;

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costs of "collective bargaining" on behalf of nonunion employees, then the duty of fair representation requires the union to provide those employees with adequate notice and hearing on its decision to impose such a fee as a condition of their employment. *See* Steele v. Louisville & N.R.R., 323 U.S. 192, 204 (1944).

And again, if proper "agency-fee" arrangements under Section 8(a)(3) are interpreted as justifiable infringements on nonunion employees' First-Amendment freedom not to associate with unions, then the First-Amendment character of the deprivation compels observance by the union of procedural requirements minimizing the potential constitutional burden it is licensed to impose on nonmember employees. Chicago Teachers Union, Local No. 1 v. Hudson, ____ U.S. ____, ____, 106 S. Ct. 1066, 1073 (1986).

(iv) provide for an expeditious hearing before an impartial decision-maker with unfettered access to all the relevant facts; and (v) to the extent possible, be self-executing and self-monitoring. The injunction the Court of Appeals approved does not meet these requirements. Rather, it amounts in practice to the type of "rebate" scheme this Court expressly disapproved in *Ellis* v. *BRAC*, 466 U.S. 435 (1984), and otherwise fails to satisfy the procedural requirements for "agency-fee" arrangements this Court established in *Chicago Teachers Union, Local No. 1* v. *Hudson*, ____ U.S. ____, 106 S. Ct. 1066 (1986).

A. Significantly, whereas the District Court had originally granted an "injunction against future collection of amounts [of 'agency fees'] * * * in excess of the amount necessary for ['collective bargaining']";[37] and the special master (after two elaborate hearings) proposed an injunction "restraining CWA * * * *from charging or collecting*" an excessive fee;[38] the District Court's final injunction, approved by the Court of Appeals, enjoins CWA only "from *retaining* * * * the amount certified as non-retainable".[39] Thus, on its face, the injunction omits any requirement of *pre*-collection notice to nonunion employees and opportunity for them to object, as mandated by *Hudson*, but instead licenses CWA to collect outright whatever fee it desires, subject only to a *later* disgorgement of any "non-retainable" amount.[40]

B. The District Court, with the Court of Appeals' sanction, did require that

> [t]he CWA defendants shall each fiscal year hold in

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[37] App. at 140a (emphasis supplied).

[38] *Ante*, note 12 & accompanying text.

[39] App. at 108a (emphasis supplied)

[40] *See* Hudson, ____ U.S. at ____, 106 S. Ct. at 1075-76.

> an interest-bearing escrow account, a portion of the agency fees paid by each plaintiff [nonunion employee] equal to twice the amount determined in the previous fiscal year to be non-retainable pending the determination [of the fee's validity].[41]

Overruling petitioners' objection, the Court of Appeals upheld this escrow-arrangement purportedly under the authority of *Ellis*, on the theory that "CWA will be unable to 'commit dissenters' funds to improper uses even temporarily' because the escrow account is not subject to CWA control".[42] Although this may be true in *some* cases, it is not true in *all*, as TABLE I (overleaf) shows.

Depending on the amount "retainable" (that is, proven to represent the union's costs of "collective bargaining" only) *in a previous year*, which may have little if anything to do with the sum of those costs *in the year in question*, in the latter year the union may obtain directly and spend immediately from 20 to 100% (!) of the "agency fees" it charges—again, without *pre*-collection notice to nonunion employees of the rationale for those fees.[43] So, contrary to the Court of Appeals' interpreta-

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[41] App. at 109a.

[42] *Id.* at 82a.

[43] Under the figures found by the District Court—21% "retainable " and 79% "non-retainable"—,CWA is required to escrow 42% and is permitted to receive directly 58% of the "agency fee" it demands. Yet this fee is *almost 280% greater than the fee the evidence shows CWA historically to have been entitled to collect.* Thus, by using the District Court's formula, CWA may *immediately receive and spend almost 180% more* than the fee the court itself determined to be legitimate!

On page 5 of its petition for a writ of certiorari in No. 86-637, CWA tells this Court that "the Union's improved recordkeeping system has shown that the Union expends between 80% and 85% of its income on matters germane to collective bargaining". Petitioners have no idea where

(continued)

tion, the escrow-requirement the District Court established clearly fails in principle to prevent the "forced loans" this Court condemned in *Ellis*.[44]

TABLE I also summarizes the perverse effect of the injunction on CWA's ability to collect an arguably improper "agency fee" in the first instance. For example, if in the previous year CWA could show *no* chargeable "collective-bargaining" costs (and thus *no* monies properly allocated as "retainable" under the District Court's jargon), in the next year it would nevertheless be entitled *to collect 100% of whatever fee it demanded*—even though the only *pre*-collection "notice" the nonunion employees had, CWA's 0% entitlement to a fee in the previous year, would suggest (if it did not compel) the conclusion that CWA's latest demand had no validity on its face. Indeed, until the point is reached where the last year's "retainable" amount is 100%, the District Court's injunction *always* licenses CWA to collect an arguably *impermissible* amount (from 100% down to 1%) based on the evidence of the previous year. Clearly, this violates *Hudson*.[45]

C. The District Court's injunction also precludes CWA "from retaining * * * the amount [of the 'agency fee'] *certified as non-retainable* by an independent Certified Public Accountant".[46] Petitioners objected to inversion of the standard from what is *chargeable*, to what is *not* chargeable; but the Court of Appeals upheld the District Court on this point *sub silentio*.

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these figures have been "shown", or to whom. Certainly CWA has presented no such data to petitioners, or to the lower courts in this case. In any event, under these figures, CWA would be required to escrow between 30 and 40%, and would be permitted to receive directly and spend between 70 and 60%, of the "agency fees" it demanded the next year—without any *pre*-spending proof that that 60-70% actually represent its "collective bargaining" costs in the year in question.

[44] *See* Ellis, 466 U.S. at 443-44.

[45] *See* Hudson, ____ U.S. at ____, 106 S. Ct. at 1075-76.

[46] App. at 108a (emphasis supplied).

TABLE I

% "RETAINABLE" LAST YEAR	% ESCROWED THIS YEAR	% IMPERMISSIBLE COLLECTION THIS YEAR, BASED ON PERMISSIBLE COLLECTION LAST YEAR	% SUBJECT TO IMMEDIATE SPENDING OVER PROTEST WITHOUT VERIFICATION OF VALIDITY
0	100	100	0
10	100	90	0
20	100	80	0
30	100	70	0
40	100	60	0
50	100	50	0
60	80	40	20
70	60	30	40
80	40	20	60
90	20	10	80
100	0	0	100

On its face, the certification of a "non-retainable" amount as the standard for an "agency fee" flies in the face of *Hudson*.[47] Under the District Court's "non-retainable" standard, CWA is entitled to collect, and perhaps even to spend immediately, up to 100% of the fee it demands, *without ever submitting any evidence (certified by an independent accountant or not) as to what costs of "collective bargaining" supposedly make up the "retainable" amount.* Instead, CWA can simply generate documents that it claims evidence "*non*-retainable" costs, submit these documents to the independent accountants, and allow them to determine if all the costs are, indeed, "non-retainable", or if some of those costs should be re-categorized as "retainable". Thus, under the "non-retainable" standard, the accountants do not determine—*and are incapable of determining*—the appropriate "agency fee" based on an examination of all the union's records that reflect alleged "collective-bargaining"costs, but only approve the sum of what CWA admits are "non-retainable" costs, without verifying that the difference between the original fee and the "non-retainable" figure has any rational relationship to actual "collective-bargaining" expenditures. At best, the accountants can reduce the "non-retainable" amount, thereby compelling nonunion employees to pay *more* than CWA originally demanded. Under no conceivable circumstances can the accountants inquire as to whether some expenditures CWA chose (for secret reasons of its own) to exclude from the "non-retainable" list are, in fact and law, "non-retainable" after all. Thus, the whole "independent review" amounts merely to a charade or shell-game, hopelessly detached from the real issue of what CWA actually expended on "collective bargaining".

This result highlights the impotence of the District

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[47] *See* Hudson, ____ U.S. at ____, 106 S. Ct. at 1076.

Court's escrow-requirement to safeguard petitioners' rights. For requiring an escrow-amount based on the previous year's "non-retainable" costs is meaningless where the method of calculating those costs is not rationally related to what the "retainable" costs, if any, may be.

D. Finally, the District Court and the Court of Appeals required petitioners to bear the financial burden of supervising CWA's "certification" of its "agency fees", unless they could prove that CWA's calculation of the "non-retainable" amount was too high. "To burden CWA with the cost" of even an arguably meritorious challenge that failed, the Court of Appeals said, would "unfairly burden the union's * * * dues-paying members".[48] This conclusion makes little sense.

Statutorily, CWA has been privileged by Section 8(a)(3) of the NLRA to infringe on nonunion employees' rights—arguably of First Amendment dimension, but certainly set out clearly in Section 7 of the Act—by demanding from them an "agency fee". However, CWA's license extends, not to *any* "agency fee" it likes, but only to an "agency fee" that in fact and law represents its *actual* costs of "collective bargaining" as those employees' Section 9(a) exclusive representative. If establishing these actual costs itself has a cost (as the collection, analysis, and reporting of information generally does in life), then that cost CWA should bear: first, because the provision of the information is the *sine qua non* to collection of the fee (that is, CWA may not even claim a fee absent the presentation of some adequate initial notice, and may not retain any fee absent satisfactory final proof of its entitlement thereto); and second, because CWA alone has access to the raw data from which the

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[48] App. at 83a.

relevant "agency-fee" information may be derived.

The special master determined (without contradiction by the District Court or the Court of Appeals) that CWA's latest system for calculating the "agency fee" cannot be self-executing, but requires constant and careful monitoring, in which review by attorneys and other experts of petitioners' selection "is an integral part".[49] In effect, the special master found, and no one has disputed, that the success of the very system CWA created in an attempt to carry its burden of proof—without which proof it would be entitled to *no* "agency fee" at all—*requires* intimate involvement of petitioners' attorneys and experts if that system is not arguably to violate petitioners' rights. Under these circumstances, the "unfairness" to CWA, or to its dues-paying members, of assigning the reasonable costs of petitioners' participation to CWA escapes rational detection.

CWA (and, presumably, the dues-paying members that constitute it) want "agency fees" from petitioners. CWA is entitled to no such fee—and incontestibly violates petitioners' statutory or First-Amendment rights—if it fails to prove that the fee it demands represents its actual costs of "collective bargaining". To prove this connexion, CWA must employ some accounting-system, and has chosen the particular system the special master suggested could satisfy its burden of proof. Clearly, if the successful implementation of that system involved *no* participation by petitioners or their representatives, CWA could not demand that petitioners nevertheless pay some portion of the cost of operating the system. Here, of course, the arguably successful operation of the system *does* require participation by petitioners that could be financially burdensome to them. But, by designing *its* system as *it* did, *CWA has chosen to involve*

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[49] *Ante*, pp. 6-8.

petitioners in the policing of its "agency-fee" demands—indeed, has made their participation mandatory if the policing is to be effective. Having affirmatively designed its system this way, when other options were available to it, CWA can hardly complain now of the "unfairness" of being required itself to assume the full costs of its own choice.

Furthermore, imposing the costs of monitoring CWA's system on petitioners is more than merely unfair. Such cost-shifting essentially vitiates everything done to date in these proceedings; for it renders future policing of CWA's activities by petitioners financially impractical. Simply by designing its system in a fashion so complex that fathoming the scheme's mysteries demands petitioners' undivided attention, CWA has to a large extent freed itself from its burden of proof, effectively shifting that burden to petitioners, who must either unravel, analyze, and disprove CWA's claims or ignorantly acquiesce therein. Inexplicable is how this result differs, in practical effect, from CWA's simply demanding some arbitrary figure as its "agency fee", offering *no* justification for that figure, and compelling petitioners to bring suit in federal court and themselves engage in extensive discovery and a trial at great monetary and temporal expense.

In summary, the injunction the Court of Appeals approved is fatally flawed in almost every important particular. It rests on a non-rational standard ("non-retainable" costs); permits collection, escrowing, and actual spending of monies by CWA that the evidence of the union's activities in past years indicates is excessive; and imposes on petitioners financial burdens fully as great as those they would have to assume in affirmatively bringing suit in federal court. Rather than a "remedy" for *proven* violations of petitioners' statutory and constitu-

tional rights, it amounts to a shield or immunization protecting CWA against exposure of its past lawlessness and encouraging it to new and perhaps even expanded wrongdoing.

CONCLUSION

For the foregoing reasons, this Court should issue a writ of certiorari to the Court of Appeals for the Fourth Circuit.

Respectfully submitted,

EDWIN VIEIRA, JR.,
Counsel of Record
13877 Napa Drive
Independent Hill, Virginia 22111
(703) 791-6780

HUGH L. REILLY
National Right to Work Legal
Defense Foundation
8001 Braddock Road, Suite 600
Springfield, Virginia 22160
(703) 321-8510

Attorneys for Petitioners

Of Counsel:

JOSEPH J. HAHN
Arvey, Hodes, Costello
& Burman
One Eighty North La Salle Street
Chicago, Illinois 60601
(312) 855-5003

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 83-1955

HARRY E. BECK, JR.; DORIS R. AMBROSE; JACQUELINE S. BRANDON; MARY ANNA COX; SALLY B. DiMAURO; RUE T.F. DOWNEY; KATHLEEN A. HEIL; JOHN J. HURLEY; HARRIETT LIPSCHULTZ; CLAY B. LUTZ; BARBARA McGAUGHEY; ROLAND R. MERKLE; ETHEL T. MERRYMAN; DORIS J. MORROW; MARION F. NORTHROP; FRANCES M. PHILLIPS; VIVIAN REEDY; BARBARA A. RUSSELL; LOIS A. STALLINGS; HARRY B. SWARTZ, SR.,
Appellees,

versus

COMMUNICATIONS WORKERS OF AMERICA (C.W.A.), an unincorporated Labor Organization; C.W.A. COMMITTEE ON POLITICAL EDUCATION (C.W.A. COPE); C.W.A. DISTRICT II; LOCAL 2100 OF C.W.A.; LOCAL 2101 OF C.W.A.; LOCAL 2108 OF C.W.A.; LOCAL 2110 OF C.W.A.,
Appellants,

and

LOCAL 2350 OF C.W.A.; AMERICAN FEDERATION OF LABOR-CONGRESS OF INDUSTRIAL ORGANIZATIONS (AFL-CIO), a Federation of National and International Labor Organizations; AFL-CIO COMMITTEE ON POLITICAL EDUCATION; MARYLAND STATE AFL-CIO; AMERICAN TELEPHONE & TELEGRAPH, a Corporation; C & P TELEPHONE COMPANY OF MARYLAND, a Corporation,
Defendants.

No. 83-1956

HARRY E. BECK, JR.; DORIS R. AMBROSE; JACQUELINE S. BRANDON; MARY ANNA COX; SALLY B. DiMAURO; RUE T.F. DOWNEY; KATHLEEN A. HEIL; JOHN J. HURLEY; HARRIETT LIPSCHULTZ; CLAY B. LUTZ; BARBARA McGAUGHEY; ROLAND R. MERKLE; ETHEL T. MERRYMAN; DORIS J. MORROW; MARION F. NORTHROP; FRANCES M. PHILIPS; VIVIAN REEDY; BARBARA A. RUSSELL; LOIS A. STALLINGS; HARRY B. SWARTZ, SR.,

Appellants,

versus

COMMUNICATIONS WORKERS OF AMERICA (C.W.A., an unincorporated Labor Organization; C.W.A. COMMITTEE ON POLITICAL EDUCATION (C.W.A. COPE); C.W.A. DISTRICT II; LOCAL 2100 OF C.W.A.; LOCAL 2101 OF C.W.A.; LOCAL 2108 OF C.W.A.; LOCAL 2110 OF C.W.A.,

Appellees,

and

LOCAL 2350 OF C.W.A.; AMERICAN FEDERATION OF LABOR-CONGRESS OF INDUSTRIAL ORGANIZATIONS (AFL-CIO), a Federation of National and International Labor Organizations; AFL-CIO COMMITTEE ON POLITICAL EDUCATION; MARYLAND STATE AFL-CIO; AMERICAN TELEPHONE & TELEGRAPH, a Corporation; C & P TELEPHONE COMPANY OF MARYLAND, a Corporation,

Defendants.

Appeals from the United States District Court
for the District of Maryland, at Baltimore
James R. Miller, Jr., District Judge. (C/A M-76-839)

Argued: April 8, 1986. Decided: September 12, 1986

Before WINTER, Chief Judge, and RUSSELL, WIDENER, HALL, PHILLIPS, MURNAGHAN, SPROUSE, ERVIN, CHAPMAN and WILKINSON, Circuit Judges, sitting en banc.

Laurence Gold (James Coppess; George Kaufman on brief) for Appellants/cross-appellees; Edwin Vieira (Joseph J. Hahn, National Right to Work Legal Defense Foundation, Inc., on brief) for Appellees/cross-appellants.

PER CURIAM:

In this cause, the existence of federal jurisdiction constituted the dividing issue both between the majority and dissenting panel opinions, as reported in 776 F.2d 1187 (4th Cir. 1985), as well as in the en banc hearing. Without reviewing the extended discussion of this issue in the two panel opinions, which delineated adequately the difference in the Court on the dispositive issue of jurisdiction, it seems sufficient for purposes of this en banc decision to summarize the ultimate jurisdictional decision as stated in the two panel opinions, beginning first with the majority opinion.

The majority panel opinion found first that the exaction of union dues from non-consenting non-union employees under an agency contract beyond the requirements for purposes of collective bargaining, grievance adjustment or contract administration was "a clear breach of section 8(a)(3) [of the NLRA] and of the union's duty of fair representation." It then concluded that federal jurisdiction "over plaintiffs' statutory suit against defendant union under section 8(a)(3) and for breach of the duty of fair representation was properly invoked under 28 U.S.C. § 1337." 776 F.2d at 1204-05 [1]

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[1] The majority opinion, in note 26 on page 1204, also opined that federal jurisdiction might also be found "under § 301 of the Taft-Hartley Act, 29 U.S.C. § 185."

The majority opinion opined that, having found federal jurisdiction for violation of both the statute and the duty of fair representation, it seemed "unnecessary . . . to consider the constitutional basis for jurisdiction" *id.*, but despite this, it proceeded to state that on constitutional grounds jurisdiction in the cause was sustainable even though it had earlier recognized that decisions on constitutional grounds should be avoided if the matter could be resolved on statutory grounds. *See* 776 F.2d at 1198 and *International Association of Machinists v. Street*, 367 U.S. 740 (1961).

The dissenting panel opinion, on the other hand, concluded that § 8(a)(3) of the NLRA "cannot fairly be read to impose" on unions under an agency shop agreement the obligation to use agency shop fees only "for purposes . . . directly related to collective bargaining, grievance adjustment, or contract administration" as against objecting non-union employees. 776 F.2d at 1214. As the dissent puts its position, "[b]oth the language of § 8(a)(3) and its legislative history show that Congress did not intend to limit the use of agency shop fees under the NLRA. Further, the history and purpose of this provision differs from the history and purpose of the agency shop provision in the Railway Labor Act; thus the Railway Labor Act's limits on fee use should not be engrafted onto the NLRA's § 8(a)(3)." 776 F.2d at 1215. Nor, the opinion continues, can such exaction by the union of these dues to be used for purposes not related to "collective bargaining, grievance adjustment or contract administration" represent a cognizable constitutional claim because the union's "use of [such non-consenting employees'] fees does not constitute state action." 776 F.2d at 1214. The dissenting opinion did not discuss the maintainability of the action as one for a violation of the duty of fair representation by the union under § 1337.

After the filing of the panel opinions, en banc hearing of the cause was voted. At the en banc hearing, the arguments of the parties focused on the existence of federal jurisdiction of the cause. The arguments of the parties on such issues followed substantially the line of the two panel opinions already summarized, with the plaintiffs relying on the jurisdictional grounds adumbrated in the panel majority opinion and with the union and its local resting their argument on the grounds stated in the dissenting opinion.

After the en banc arguments, five members of the Court (Judges Russell, Widener, Ervin, Chapman, and Wilkinson), voted that federal jurisdiction "over plaintiffs' statutory suit against defendant union under section 8(a)(3) and for breach of the duty of fair representation was properly invoked under 28 U.S.C. § 1337," but three of these five judges (Judge Widener, Ervin, and Wilkinson) felt it unnecessary to consider whether jurisdiction also existed on constitutional grounds. Judges Russell and Chapman, the other members of the group, however, were of the opinion that jurisdiction of the cause could also be sustained on the constitutional claim. Judge Murnaghan, speaking for himself, in a separate concurring opinion, filed along with this order and opinion, found that federal jurisdicion existed in this case to decide the plaintiffs' claims as violations of the union's statutory duty of fair representation, under *Vaca v. Sipes*, 386 U.S. 171 (1967),[2] but he agreed with the dissenting panel opinion insofar as it would deny federal jurisdiction on either the statutory or the constitutional grounds. The result is that six Judges of the Court voted to sustain federal jurisdiction over the cause, though in some instances on somewhat varying grounds.

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[2] It is inaccurate to state that the majority opinion did not find jurisdiction on the violation of the duty of fair representation by the union. The majority panel opinion did assert such jurisdiction but it did not assert it with the same depth of reasoning and perception as does Judge Murnaghan's concurring opinion.

Four members of the Court have, however, voted after the en banc hearing, (Judges Winter, Hall, Phillips, and Sprouse) to sustain the conclusions of the dissenting panel opinion that here was no federal jurisdicion herein either on statutory or constitutional grounds. The dissenting opinion did not specifically address the violation of the duty of fair representation, as alleged in the plaintiffs' complaint and as found in both the majority panel opinion and in the concurring opinion of Judge Murnaghan to be a basis for jurisdiction herein, but it is to be assumed that this ground was similarly disapproved in the dissenting opinion.

It follows that the en banc court by a vote of six to four sustained federal jurisdiction in this cause. There was apparently no difference within the Court, assuming that federal jurisdiction was upheld, that the majority panel opinion's disposition of the allocation issue was properly resolved.

Accordingly, the result of the en banc consideration is the affirmation by the en banc court of federal jurisdiction over the cause and of the majority panel's determination on the allocation issue.

MURNAGHAN, Circuit Judge, concurring:

The posture of the case, the order of my writing and the outcome are, if not unique, at least unusual. A two-to-one majority at the panel level held unconstitutional a labor union's practice of using agency fees, received from employees who were not union members, for purposes unrelated to collective bargaining, grievance adjustment, or contract administration. Alternatively, the majority concluded that the union's conduct had violated § 8(a)(3) of the National Labor Relations Act, 29 U.S.C. § 158(a)(3). The non-member employees were entitled to relief for that violation, in the majority's view,

on two theories: first, that § 8(a)(3) itself provided them with a cause of action justiciable in the federal courts, and, second, that the definition of an unfair labor practice contained in § 8(a)(3) also described a breach of the duty of fair representation.[3] Judge Russell authored the majority opinion, with Judge Chapman concurring. *Beck v. Communications Workers of America*, 776 F.2d 1187 (4th Cir. 1985).

Chief Judge Winter, in dissent, concluded that the absence of government action foreclosed the constitutional route to recovery, and that § 8(a)(3), involving only controversies between employers and employees, created no restriction on a union's authority to use agency fees for non-collective-bargaining purposes. He further concluded that, in the absence of a violation of § 8(a)(3), there could be no breach of the duty of fair representation, and that, in any event, the plaintiffs had no cause of action based on § 8(a)(3) itself, due to the National Labor Relations Board's exclusive jurisdiction to deal

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[3] The extent to which the panel majority relied on the duty of fair representation is unclear. On the one hand, the opinion states that "plaintiffs have stated a good cause of action for a violation of . . . the duty of fair representation" as well as for a violation of § 8(a)(3). 776 F.2d 1187, 1196. Moreover, the majority plainly concluded that it was the fair representation claim that brought the statutory aspect of the case within this court's jurisdicion, rather than within the exclusive jurisdiction of the NLRB. *Id.* at 1203-04. On the other hand, the majority's rationale for its holding on the statutory issue is explained exclusively in terms of § 8(a)(3) and its relationship to § 2, Eleventh of the Railway Labor Act, with no consideration given to the independent force of the duty of fair representation. In addition, the opinion states that "[o]nly if jurisdiction of these claims *under § 8(a)(3) itself* is non-existent would a dismissal of this action . . . be appropriate." *Id.* at 1196 (emphasis supplied). These somewhat contradictory indications are reconciled, it seems to me, if the opinion is read to hold that a breach of the duty of fair representation follows automatically from a violation of § 8(a)(3). If I have misread Judge Russell, I solicit his indulgence.

with unfair labor practices under the doctrine of *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 245 (1959). *Id.* at 1214-25.

A grant of rehearing *en banc*, of course, eliminated the panel level decisions as grounds for disposing of the case. Back at square one, the court divided six to four. Judge Widener, Judge Ervin and Judge Wilkinson joined Judge Russell and Judge Chapman on one side of the great divide, while Judge Hall, Judge Phillips and Judge Sprouse aligned themselves with Judge Winter.

I find myself in an odd position. On the two issues addressed by my brothers, I find myself in Chief Judge Winter's camp. In my view, governmental authority cannot be ascribed to the union here, and hence there can be no constitutional violation. Nor, I believe, does § 8(a)(3) in itself prohibit unions from spending agency fees for purposes unrelated to collective bargaining, grievance adjustment, or contract administration. Those arguments are fully adequate to rebut the contentions marshalled by Judge Russell. However, another set of considerations, raised by the plaintiffs[4] but not dealt with

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[4] In his dissenting opinion at the *en banc* level, Chief Judge Winter argues that the issue of the duty of fair representation was neither advanced by the parties nor considered by the panel majority. *Post*, at 1. It is true that, in the briefs and oral arguments, the duty of fair representation was overshadowed by the parties' emphasis on § 8(a)(3). However, that seems to have occurred because the parties, like the panel majority, believed that § 8(a)(3) provided a sort of "standard of care" for the duty of fair representation, and not because they believed that the plaintiffs' claim rested on § 8(a)(3) alone. A review of the record reveals the inaccuracy of the suggestion that the fair representation issue is of my own devising.

The duty of fair representation was initially raised as a ground for relief in the plaintiffs' complaint. Supplemental Appendix 15. Moreover, it is noteworthy that, although the issue was raised separately, the complaint also charged that the union's expenditure of agency fees violated its fiduciary duty to all bargaining unit

by Chief Judge Winter or by Judge Russell, has led me to the conclusion that the plaintiffs should prevail. It is one thing to be out of step with everyone but Johnny. It is even more lonely to find my vote the casting one, where that status derives from its alignment with five votes in favor of a rationale I disagree with and its operation to four votes whose rationale, to the extent expressed, I approve.

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employees. *Id.* at 12-15. The plaintiffs' failure, at that stage, to perceive a connection between their claims surely does not prevent this court from doing so.

The question of the duty of fair representation was raised again in the briefs submitted in connection with the initial hearing on appeal before a panel of this court. The defendants pointed out that because claims based directly on § 8(a)(3) are within the exclusive jurisdiction of the National Labor Relations Board, the plaintiffs would have to find an alternative basis for their statutory claim if they wished this court to consider it. Reply Brief of Appellants/Cross-Appellees 9-10. The plaintiffs responded with the argument that the statutory basis for their claim actually lay in the implied duty of fair representation. Appellees' Supplemental Brief 2-3. Although the plaintiffs did not clarify their view of the relationship between the basis of their claim in the duty of fair representation and their arguments under § 8(a)(3), the only reasonable interpretation of their position seems to be that they believed that § 8(a)(3) provided a convenient standard by which the presence or absence of a breach of the duty of fair representation could be tested.

Finally, the panel majority's opinion clearly considered and agreed with the plaintiffs' arguments concerning the fair representation issue. A close reading of that opinion reveals that the panel majority believed that the plaintiffs had two alternative statutory claims, one based directly on § 8(a)(3), the other based on the duty of fair representation. The panel majority concluded that the union's expenditure of agency fees was "not only a violation of the statute itself but also a violation of the duty of fair representation." 776 F.2d at 1203. The majority then explained, in an extensive discussion, that the presence of the fair representation claim provided the court with jurisdiction and defeated the argument that exclusive jurisdiction lay with the NLRB. *Id.* at 1203-04.

I.

The plaintiffs are twenty employees of the American Telephone and Telegraph Company and the Chesapeake & Potomac Telephone Company. Both employers have negotiated collective bargaining agreements with the Communications Workers of America (CWA). Both collective bargaining agreements contain an "agency shop" provision, which requires the employer to deny employment to any employee who refuses either to join the CWA or to pay the CWA agency fees equivalent to union dues. The plaintiffs are employees who are not members of the union, and who have regularly paid the required agency fees. The CWA and its locals use a part of the fees paid by the plaintiffs for purposes unrelated to collective bargaining, contract administration, or grievance adjustment.

The plaintiffs filed the present action in the United States District Court for the District of Maryland in June 1976. The plaintiffs alleged that the CWA had violated both its statutory duty of fair representation and the plaintiffs' First Amendment rights of freedom of expression by executing and enforcing the agency shop provisions in such a manner as to coerce the plaintiffs into paying fees which are not used for collective bargaining purposes. Although the union had adopted an internal procedure for the refund of the appropriate portion of dues and fees to employees who objected to such expenditures, the plaintiffs contended that the procedure was inadequate. The plaintiffs sought a declaratory judgment establishing the illegality of the exaction of fees for non-collective-bargaining purposes, an injunction against the CWA's continued use of agency fees for such purposes, and a monetary judgment for fees collected and used for such purposes in the past.

The CWA moved to dismiss the action because of the plaintiffs' failure to exhaust internal union procedures

for resolving the dispute, or, in the alternative, for a stay pending such exhaustion. The district court denied the motion. *Beck v. Communications Workers of America*, 468 F. Supp. 87, 90-91 (D. Md. 1979). The district court reasoned that deferral to the union's internal rebate procedure was not warranted where the plaintiffs alleged that the procedure itself violated their rights. The CWA does not appeal that decision.

The district court subsequently decided that the plaintiffs were entitled to the relief they sought. Addressing the question of restitution of amounts previously collected and improperly used, the court ruled that if the parties could not agree upon the sums to be refunded, the court would appoint a special master to make that determination. *Beck v. Communications Workers of America*, 468 F. Supp. 93, 97 (D. Md. 1979).

The parties were unable to agree on the amounts to be refunded, and a master was appointed. In his first report, filed August 18, 1980, the master found that only 19% of the CWA's total expenditures were made for purposes related to collective bargaining and contract administration, and he recommended that 81% of past agency fees collected by the CWA be refunded to the plaintiffs. The CWA filed exceptions to the report. The district court remanded the matter to the master, directing the master to make specific findings in response to questions prepared by the court. *Beck v. Communications Workers of America*, 106 LRRM 2323 (D. Md. 1981). The master filed a supplemental report in September 1981 which largely reaffirmed his earlier findings. The CWA filed exceptions to the supplemental report.

On March 5, 1982, while the district court was considering those exceptions, the union filed a motion under Fed. R. Civ. P. 12(b)(6) to dismiss the complaint for failure to state a claim. The union contended that the plaintiffs' constitutional claim failed for lack of govern-

ment action, and that the statutory claim failed because the union's conduct did not violate the duty of fair representation.

The district court apparently ignored the union's motion to dismiss, thereby effectively denying the motion. Instead, the district court granted judgment for the plaintiffs for restitution of previously paid agency fees in specified amounts. The district court also permanently enjoined the CWA and its locals from retaining from the plaintiffs in the future the portion of their agency fees certified as non-retainable by an independent certified public accountant.

On appeal, the CWA raised two claims of error. First, it argued that its motion to dismiss the complaint should have been granted. Second, it contended that, if the complaint properly stated a claim, the district court and the special master had applied an erroneous standard of proof in determining the amount of the plaintiffs' refunds. Judge Russell, joined by Judge Chapman, held that the plaintiffs had properly stated a claim for violation of both their constitutional rights and the requirements of § 8(a)(3); they then went on to agree with the union that an enormous standard of proof had been applied. The panel therefore voted to vacate some of the special master's conclusions and to remand the case for further proceedings. *Beck v. Communications Workers of America*, 776 F.2d 1187 (4th Cir. 1985). Chief Judge Winter, in dissent, concluded that the motion to dismiss the complaint should have been granted. *Id.* at 1214-25.

II.

Chief Judge Winter has, in my opinion, the better of the arguments as to whether the Communications Workers of America, in applying agency fees to non-collective-bargaining purposes, has infringed First Amendment rights of the plaintiffs or breached a statutory duty under § 8(a)(3). I simply do not perceive the existence

of governmental action sufficient to invoke the Constitution. Moreover, I agree with Chief Judge Winter that the courts do not have jurisdiction to consider a claim resting directly on § 8(a)(3). Claims based on conduct which arguably amounts to an unfair labor practice under § 8 of the National Labor Relations Act are within the exclusive jurisdiction of the National Labor Relations Board. *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 245 (1959). While we may, of course, review the unfair labor practice determinations of the NLRB, § 8(a)(3) provides no right of action that is cognizable in the first instance in the federal courts.[5]

On the other hand, federal courts plainly have jurisdiction to decide claims for violation of a union's statutory duty of fair representation. *Vaca v. Sipes*, 386 U.S. 171, 176-88, (1967). Because that duty does not arise from the NLRA's unfair labor practice provisions, such claims were originally thought to be outside the scope of the NLRB's jurisdiction. Somewhat belatedly, the NLRB decided that a union's breach of its duty of fair representation also constitutes an unfair labor practice under §§ 8(b)(1) and 8(b)(2). *Miranda Fuel Co.*, 140 NLRB 181 (1962), *enforcement denied*, 326 F.2d 172 (2d Cir. 1963). Nevertheless, in *Vaca v. Sipes*, *supra*, the Supreme Court explicitly held that the NLRB's assumption of jurisdiction did not deprive the federal courts of jurisdiction, despite the holding in *San Diego Building Trades Council v. Garmon*.[6] Thus, it is settled that

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[5] No siimlar jurisdictional problem exists with respect to the analogous provision of the Railway Labor Act, § 2, Eleventh, relied on by Judge Russell, which also authorizes the adoption of union shop and agency shop agreements. Unlike § 8(a)(3), § 2, Eleventh is not subject to the jurisdiction of an administrative board. Indeed, there is no administrative board under the RLA whose functions parallel those of the NLRB.

[6] The Court explained that:

> [A] primary justification for the pre-emption doctrine [announced in *Garmon*]—the need to avoid conflicting rules of

suits for breach of the duty of fair representation, unlike claims based on § 8(a)(3), are cognizable in federal courts.

Chief Judge Winter assumed, however, that the scope of the duty of fair representation, as it relates to the use of agency fees, is merely coextensive with the requirements of § 8(a)(3). He therefore concluded that, in the absence of a violation of § 8(a)(3), the fair representation issue was also necessarily resolved in favor of the union. It is at this point that I part company with Chief Judge Winter's analysis. The extent of the duty of fair representation is not identical to that of § 8(a)(3). The two statutory obligations are quite distinct. The duty of fair representation does not arise from § 8(a)(2) or from any of the NLRA's unfair labor practice provisions; rather, it is implicit in the statute as a whole. *See Vaca v. Sipes*, 386 U.S. 171, 177 (1967); *Humphrey v. Moore*, 375 U.S. 335, 342 (1964); *Ford Motor Co. v. Huffman*, 345 U.S. 330, 337 (1953).[7] Conduct that amounts to an

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> substantive law in the labor relations area and the desirability of leaving the development of such rules to the administrative agency created by Congress for that purpose—is not applicable to cases involving alleged breaches of the union's duty of fair representation. . . . [A]s these matters are not normally within the Board's unfair labor practice jurisdiction, it can be doubted whether the Board brings substantially greater expertise to bear on these problems than do the courts, ... Nor do we think that Congress intended to shield employers from the natural consequences of their breaches of bargaining agreements by wrongful union conduct in the enforcement of such agreements.

Vaca v. Sipes, 386 U.S. at 180-81, 186.

[7] Insofar as the statutory source of the duty may be more precisely located, it is to be found in § 9(a) of the Act, which grants to recognized unions the privilege of acting as the exclusive bargaining representative of all employees. *Kolinske v. Lubbers*, 712 F.2d 471, 481 (D.C. Cir. 1983); *Local Union No. 12, United Rubber Workers v. N.L.R.B.*, 368 F.2d 12, 17 (5th Cir. 1966); *Price v.*

infringement of § 8(a)(3) may also violate the duty of fair representation, but it does not follow that there can be no fair representation breach in the absence of a § 8(a)(3) violation.

An analysis of the application of the duty of fair representation in the present case must begin with the threshold question whether the duty is implicated at all in the collection and spending of agency fees. A union's duty of fair representation extends only to the union's conduct in representing employees in dealing with their employer. *Kolinske v. Lubbers*, 712 F.2d 471, 481 (D.C. Cir. 1983). The union must abide by that duty, for example, in negotiating a collective bargaining agreement, *Ford Motor Co. v. Huffman*, 345 U.S. 330 (1953), or in adjusting an employee's grievance, *Bowen v. United States Postal Service*, 459 U.S. 212 (1983); *Vaca v. Sipes*, 386 U.S. 171 (1967). On the other hand, the duty of fair representation does not apply to the union's treatment of employees within its own internal structure. *Bass v. International Brotherhood of Boilermakers*, 630 F.2d 1058, 1062-63 (5th Cir. 1980).

The duty of fair representation, however, extends to a union's collection and use of agency fees. If dissenting employees refuse to pay the portion of their fees that is to be used for non-collective-bargaining purposes, the employer is obligated, under the terms of the agency shop clause of the collective bargaining agreement, to discharge them. The matter thus involves the union's representation of employees in dealing with the employer, thereby implicating the duty of fair representation. In particular, the collection of agency fees from employees who are *not* union members can hardly be characterized as a purely internal union matter, because the union would

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United Auto Workers, 621 F.Supp. 1243, 1250 (D. Conn. 1985). That privilege carries with it the duty to represent all employees fairly. *Humphrey v. Moore*, 375 U.S. 335, 342 (1964); *Steele v. Louisville & Nashville R.R. Co.*, 323 U.S. 192, 200-04 (1944).

have no power to coerce the payment of fees from such employees absent the threat of action by the employer.[8]

The duty of fair representation imposes on a recognized union an obligation that is fiduciary in nature. *Howard v. Aluminum Workers Int'l Union*, 589 F.2d 771, 774 (4th Cir. 1978); *Thompson v. Brotherhood of Sleeping Car Porters*, 316 F.2d 191, 201 (4th Cir. 1963).[9] The union's exclusive bargaining status, which involves a power to act on behalf of all employees, necessarily creates a relationship of trust. The Supreme Court has explained that the relationship between a union and the employees whom it represents is governed by the "principle of general application that the exercise of a granted power to act in behalf of others involves the assumption toward them of a duty to exercise the power in their interest and behalf." *Steele v. Louisville & Nashville R.R. Co.*, 323 U.S. 192, 202 (1944). In effect, the union acts as the agent of the employees it represents, union and non-union alike. *Humphrey v. Moore*, 375 U.S. 335, 342 (1964); *Wallace Corp. v. Labor Board*, 323 U.S. 248, 255 (1944). As an agent, the union may not seek to further its own interests at the expense of a principal.

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[8] The issue here is thus very different from that presented in *Kolinske v. Lubbers*, 712 F.2d 471 (D.C. Cir. 1983), which held that the duty of fair representation was not implicated in a union's unilateral decision not to distribute strike benefits to non-union employees who honored a picket line but failed to participate in various strike activities. The union's refusal to pay strike benefits to a non-member who refused to participate in strike activities was properly characterized as an internal union matter because the authority to make and enforce that decision lay solely with the union, and did not depend on, and indeed could hardly count on, the cooperation of the employer.

[9] *Accord, N.L.R.B. v. Local 282, Int'l Brotherhood of Teamsters*, 740 F.2d 141, 147 (2d Cir. 1984); *Deboles v. Trans World Airlines*, 552 F.2d 1005, 1014 (3d Cir. 1977); *Waiters Union, Local 781 v. Hotel Ass'n*, 498 F.2d 998, 1000 (D.C. Cir. 1974); *Local Union No. 12, United Rubber Workers v. N.L.R.B.*, 368 F.2d 12, 17 (5th Cir. 1966).

Instead, the union must use the fees collected from employees only for purposes within the scope of the agency relationship.

With respect to employees who are not members of the union, the scope of the union's agency function is defined, not by mutual consent, but by law. Unlike traditional agency relationships, the association between a union and non-member employees is not shaped by the agreement of the parties, but is imposed by statute. Therefore, the scope of the union's agency function corresponds to the extent of its statutory authority to represent non-member employees. Because that authority is confined to collective bargaining, contract administration or grievance adjustment, it follows that agency fees may be used only for those purposes.[10]

It is not necessary now to decide whether the scope of the union's agency function—and hence the extent of its permissible use of employee funds—is the same with respect to union members as it is with respect to non-members. The contractual arrangements between the union and its members are not before us. Nor is it necessary to decide whether a union's use of members' dues for purposes outside the scope of its agency function should properly be remediable by the courts, or should be left to be resolved through internal union processes.[11]

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[10] Of course, it is possible that non-member employees might voluntarily choose collaterally to extend the statutory right of representation, and thereby contractually to use the union as their agent for some purpose unrelated to collective bargaining. To that extent, the scope of the union's agency function would be defined by mutual consent, and could be treated under traditional principles of contract law and agency law. Amounts spent by the union pursuant to such express authorization by non-member employees would not involve a breach of the duty of fair representation.

Here, however, there is no indication of mutual consent extending the union's authority beyond that spelled out by statute.

[11] Chief Judge Winter asserts, *post* at 4, that "[a]gency fees are the equivalent of union dues," and that for the purposes of

Those questions are not presented here, because none of the plaintiffs are union members.

My conclusion is not foreclosed by the legislative history of the Taft-Hartley Act, which is retraced in Chief Judge Winter's panel dissent. *Beck v. Communications Workers of America*, 776 F.2d 1187, 1215-18 (4th Cir. 1985). In the first place, it should be borne in mind that the 1947 Congress' failure to enact legislation imposing limits on union spending is an instance, not of positive action, but of inaction. As the Supreme Court has pointed out, "[o]rdinarily, and quite appropriately, courts are slow to attribute significance to the failure of Congress to act on particular legislation." *Bob Jones University v. United States*, 461 U.S. 574, 600 (1983). "'Unsuccessful attempts at legislation are not the best of guides to legislative intent,'" *id.*, *quoting Red Lion Broadcasting Co. v. F.C.C.*, 395 U.S. 367, 382 n.11 (1969), because, rather than indicating a clear intent, "[c]ongressional inaction frequently betokens unawareness, preoccupation, or paralysis." *Zuber v. Allen*, 396 U.S. 168, 185-86 n.21 (1969).

Second, insofar as any congressional intent may be discerned from Congress' failure to act, the legislative

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regulating union expenditures members and non-members should be treated alike. That view overlooks an important distinction between members and nonmembers: members have the right to vote in union elections. By exercising their right to vote, union members can indirectly control the union's spending decisions. Nonmembers, who do not have a right to vote, lack any power over union policy-making and must trust in the good faith of union officials in protecting their interests. The union member's voting power might or might not justify a determination that the relationship between a union and its members is not sufficiently fiduciary to warrant judicial intervention with respect to expenditures of dues for non-collective bargaining purposes; that question is not before us here. What is clear, however, is that the non-union member, who lacks any means of imposing limits on the freedom of union officials to deal with his compulsory contributions, is in a situation quite different from that of the union member and of the kind that traditionally calls for judicial protection.

history indicates merely that Congress chose not to restrict unions' expenditures of employees' funds through the use of unfair labor practice provisions. Nothing in the legislative history indicates that Congress intended to preclude the development of such restrictions by the courts under the principles of the duty of fair representation.[12] Finally, even if the legislative history of the Act may be read affirmatively to permit union expenditures of *members' dues* for purposes unrelated to collective bargaining—thereby foreclosing the possibility of a breach of the duty of fair representation based on such expenditures—the legislative history is altogether silent on the question of union uses of *non-members' agency fees*. The provisions of the House bill regulating the "reasonableness" of union exactions, which were ultimately rejected by the Conference Committee, were concerned only with members' dues, and not with fees paid by non-members. H.R. 3020, 80th Cong., 1st Sess. §§ 7(b), 8(c)(2) (1947). The opponents of those provisions, whose view prevailed in the final version of the statute, acted on the basis of a conviction that the government should avoid the policing of internal union affairs, H.R. Rep. No. 245, 80th Cong., 1st Sess. 76 (1947) (minority views); 93 Cong. Rec. 6601 (1947) (statement of Sen. Taft)—not of matters involving outsiders to the union.[13] There is simply no indication in the legislative history that Congress intended that unions should be free from legal accountability for their collec-

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[12] Congress was aware, at the time of the enactment of the Taft-Hartley Act in 1947, of the judicial implication of the duty of fair representation under the federal labor statutes. The duty had first been recognized three years earlier in *Steele v. Louisville & Nashville, R.R.*, 323 U.S. 192 (1944).

[13] Congress later overcame many of its objections to governmental intrusion into internal union affairs with the passage of the Labor Management Reporting and Disclosure Act of 1959, 29 U.S.C. § 401 *et seq.*, which established a "bill of rights" for union members against their union leadership.

tion and use of non-members' fees.[14] The legislative history, then, poses no obstacles to the view that union

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[14] Chief Judge Winter argues, *post* at 4-6, that Congress in 1947 consciously adopted a "hands off" approach to unions' expenditures of agency fees. In my view, that inference is simply too tenuous to be accepted. None of the evidence pointed to by Judge Winter provides any real support for that conclusion. On the contrary, both § 8(d)(4) of the original House bill, *reprinted in* 2 *Legislative History of the Labor Management Relations Act* 56-58 (1948), which was a precursor of the present proviso to § 8(a)(3), and the remarks of Senator Taft in the Senate debates, 93 Cong. Rec. § 4400 (April 30, 1947), *reprinted in* 2 *Legislative History of the Labor Management Relations Act* 1142 (1948), indicate that their authors were focusing on the question of union *membership*.

It is true that both the drafters of the House bill and Senator Taft endorsed the union shop, but the union shop is not the same as the agency shop. Both differ from the closed shop in that the employer is not obligated to hire employees only from among persons who are *already* union members. However, under a union shop arrangement, new employees must become, or at least seek to become, union members within a brief period after their employment commences. While the union may deny them membership, they cannot choose to remain nonmembers. In an agency shop, on the other hand, membership in the union is entirely optional. Judge Winter has pointed to nothing in the legislative history that suggests that Congress consciously focused on the latter kind of arrangement. The portions of the House bill and the Senate debates cited by the dissent reveal a concern for the would-be union member who is denied membership in a union shop arrangement, but they have no bearing on agency shops or agency fees.

No discussion of Congress' intent in the Taft-Hartley Act with respect to agency shop arrangements can ignore the Supreme Court's decision in *NLRB v. General Motors*, 373 U.S. 734 (1963). There, the Court held that the proviso to § 8(a)(3), which exempted union shop arrangements from prohibition as an unfair labor practice due to their discriminatory nature, also extended to agency shop agreements. The Court's decision was undoubtedly correct, but it was not based on a perception that Congress consciously considered the problem of agency shops in 1947. Rather, implicitly acknowledging the lack of evidence of any such conscious consideration, the Court looked to the interpretation that would be most consistent with "the desire of Congress to reduce the evils of compulsory unionism while allowing financial support for the bar-

expenditures of agency fees collected from non-members for non-collective-bargaining purposes violates the duty of fair representation.

III.

Because I have concluded that the plaintiffs here are entitled to the relief they seek, I must, like Judge Russell and those aligned wth him, reach the union's second assignment of error—their contention that the special master and the district court applied the wrong standard of proof in determining which categories of union expenditures were permissible. On this issue, I agree that the proper standard is one of preponderance of the evidence, *Ellis v. Brotherhood of Railwaq Clerks*, 446 U.S. 435, 457 n.15 (1984), and that all disputed factual issues should therefore be remanded for redetermination under the correct standard of proof.

IV.

In recapitulation, it appears, on reading Judge Russell's *en banc* opinion, that:

1) The Court has concluded that the plaintiffs are entitled to relief, by a vote of five who find that the defendants have breached a duty imposed on them by § 8(a)(3), and of one who finds no violation of § 8(a)(3), but concludes that the duty of fair representation created principally by § 9(a) has been infringed, as against four who deny any statutory violation.

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gaining agent." *Id.* at 744. While that broad congressional purpose can easily support the conclusion drawn from it in *General Motors*, it simply cannot, without severe logical strain, be made the basis of an inference that Congress considered and rejected the posibility of any restrictions on unions' expenditures of agency fees. Indeed, if anything, it cuts the other way: imposing fiduciary responsibilities on unions with respect to agency fee expenditures would tend to reduce the burdens of compulsory unionism for the non-member employee, while at the same time guaranteeing the union financial support for its collective bargaining activities.

2) The constitutional grounds asserted as a basis for recovery by the plaintiffs have received support from Judge Russell and Judge Chapman. Five members of the Court (Chief Judge Winter, Judge Hall, Judge Phillips, Judge Sprouse and I) have concluded that no such constitutional basis for relief exists. Three Court members (Judge Widener, Judge Ervin and Judge Wilkinson) have not reached the question, considering it unnecessary to do so in light of the posture of the Court on the statutory issue.

3) By a vote of six, the Court has decided that there must be remanded for a proper allocation as among permissible and impermissible expenditures chargeable to the plaintiffs such items as were not specifically determined in the panel majority opinion to be permissible or unallowable. The remaining four members of the Court have not reached the question.

WINTER, Chief Judge, dissenting:

For the reasons set forth in the dissenting panel opinion, Beck v. Communications Workers of America, 776 F.2d 1187, 1214-25 (4 Cir. 1985), I conclude that the judgment of the district court should be reversed and it should be directed to dismiss the complaint.[1] From a contrary disposition, I respectfully dissent.

Although the dissenting panel opinion sets forth what I consider to be the correct resolution of the legal is-

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[1] The dissenting panel opinion spoke to the issues of state action and the duty of a union under § 8(a)(3) of the National Labor Relations Act because the panel majority based its judgment on both. The in banc majority has declined to consider the issue of state action. It is interesting to note, however, that the Second Circuit in Price v. International Union, —— F.2d —— (July 16, 1986), has emphatically rejected the view of the panel majority on the state action issue.

sues presented by this appeal, I am constrained to comment on the separate opinion of Judge Murnaghan.

The thesis advanced by Judge Murnaghan is essentially one of his own devising. It is not one advanced by the parties and litigated by them. Although the in banc per curiam opinion now claims that the majority panel opinion rested, in part, on Judge Murnaghan's theory, the weakness of the claim is fully exposed in note 3 of what Judge Murnaghan has written. Certainly a single obscure reference in almost twenty-five pages of text, is a fair indication that not much reliance was put on the theory.

In any event, Judge Murnaghan expresses the view that while § 8(a)(3) of the National Labor Relations Act, 29 U.S.C. § 158(a)(3), does not prohibit unions from spending agency fees for purposes unrelated to collective bargaining, grievance adjustment, or contract administration, a union's duty of fair representation under § 9(a) of the Act, 29 U.S.C. § 159, prohibits such expenditures with agency fees collected from dissenting employees. Judge Murnaghan's view does not withstand close scrutiny.

The duty of fair representation is a judicial doctrine derived from the statutory duty of representatives designated or selected for the purposes of collective bargaining to "be the exclusive representatives of *all* of the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment . . . ." § 9(a) (emphasis added)". The doctrine was first formulated with respect to the Railway Labor Act, Steele v. Louisville & Nashville Railroad Co., 323 U.S. 192 (1944), and it was extended to the National Labor Relations Act in Ford Motor Co. v. Huffman, 345 U.S. 330 (1953). As described in Vaca v. Sipes, 386 U.S. 171, 177 (1967):

> Under this doctrine, the exclusive agent's statutory authority to represent all members of a designated

> unit includes a statutory obligation to serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct.

As the cases demonstrate, the doctrine is generally invoked to redress discriminations by a union on the basis of race, because of animosiy toward a member of the bargaining unit, in short, because of any irrational, unequal, unfair treatment of a member of the bargaining unit. It has been held that the doctrine is inapplicable to internal union matters that do not involve the employer such as the expenditure of dues. *See* Price v. International Union, —— F.2d —— (2 Cir., July 16, 1986).[2] It hardly seems applicable where the union's challenged expenditures were made equally on behalf of all members of the collective bargaining unit, dues paying union members and agency-fee paying nonunion members alike. Absent proof that a union acted arbitrarily, discriminatorily, or in bad faith in spending its revenues, there is no breach of the duty of fair representation even if the employer is also involved. *See Price, supra.*

More importantly, it would seem obvious to me that the duty of fair representation, derived from § 9 of the Act, cannot be transgressed if a union does only what Congress has intentionally refrained from prohibiting it to do. As the dissenting panel opinion spells out in detail, 776 F.2d at 1215-18, Congress was fully aware of proposals to limit the use of monies collected from mem-

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[2] *Price* also points out that suit for breach of the duty of fair representation will ordinarily not be entertained until there has been an exhaustion of internal union remedies. Whether there was exhaustion of any available remedies in this case is far from clear. Perhaps non-exhaustion was the reason why the parties did not advance the argument constructed by Judge Murnaghan.

bers of the bargaining unit for purposes not directly related to collective bargaining, grievance adjustment, etc. It took testimony protesting the expenditure of such monies for political purposes, and it considered a number of legislative proposals to prohibit or severely limit such expenditures. In the final analysis, it rejected all of the proposed restrictions and enacted legislation only limiting excessive or discriminatory initiation fees for union membership, 29 U.S.C. § 158(b)(5), and prohibiting the use of monies collected in connection with federal elections, 2 U.S.C. § 441(b)(3).[3] It is abundantly clear from the legislative history of these provisions that more stringent regulation was rejected as a matter of legislative judgment and not because of any thought that regulation was unnecessary because the judicial doctrine of fair representation established at the time that Congress considered the issue of regulation accomplished that result.[4] From my study of the legislative history, I think

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[3] Plaintiffs make no claim that either of these restrictions was violated.

[4] It is disingenuous to assert that the members of Congress who vigorously debated the union security provision of § 8(a)(3) were aware that regardless of their legislative compromise, the judiciary remained free to imply additional limitations under the duty of fair representation. *See ante* at 22 & n.11 (Murnaghan, J., concurring). It is true that the Supreme Court first recognized that duty in Steele v. Louisville & Nashville R.R., 323 U.S. 192 (1944) three years before Congress enacted the Taft-Hartley Act. But *Steele* merely held that under the Railway Labor Act, a union could not refuse to represent black employees in the collective bargaining process because it had a "duty to exercise fairly the power conferred upon it in behalf of all those for whom it acts, without hostile discrimination against them." *Id.* at 203. Unlike the present case where Judge Murnaghan implies from the Act a limitation that Congress rejected, the *Steele* could could fairly state that a duty to represent all the workers of a unit in collective bargaining with the employer "expresse[d] the aim of Congress." *Id.* at 202. Three years later when Congress decided as a matter of national labor policy to reject proposed limitations on union dues, it is untenable to think that it was "aware" that the *Steele* decision

it sheer sophistry to assert that Congress decided on a course of very limited regulation only with respect to dues from union members and not also with respect to agency fees. Agency fees are the equivalent of union dues, and it is inconceivable to me that Congress specifically intended not to regulate the expenditure of union dues except in minor respects but, by mere silence, intended the expenditure of agency fees to be regulated under the judicial doctrine of the duty of fair representation.[5]

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might serve to accomplish the same thing. It is testament to the unforeseeability of this reading of *Steele* that no other court has expanded the duty of fair representation for nearly forty years.

[5] Judge Murnaghan argues, *ante* at 22-23, that the legislative history only shows that Congress rejected limits on union expenditures of *members'* dues, leaving open the possible regulation of nonmembers' agency fees. It is true that the provisions of the House bill limiting initiation fees and dues to "reasonable" amounts expressly applied only to "members." H.R. 3020, 80th Cong., 1st Sess. §§ 7(b), 8(c)(2) (1947); *see Beck*, 776 F.2d at 1216 (Winter, C.J., dissenting). But the union security agreement provision of that bill, § 8(d)(4), much like the present § 8(a)(3), would have made it an unfair labor practice for the employer to deny employment to individuals whose membership was denied despite their "tender[ing] to the [labor] organization the initiation fees and dues *regularly imposed as a condition of membership therein* . . . ." Nonmembers had a right to work under this bill if they tendered the dues "regularly imposed" on *members*, and, thus, through § 8(d)(4) the reasonableness limitations would have applied to agency fees. In rejecting this bill, Congress rejected the regulation of fee collection from members *and* nonmembers for reasons applicable to both. The House Minority Report criticized the bill's attempt to monitor union fees as an undue regulation of unions' internal affairs that, as a practical matter, was unenforceable because of "the infinite details involved in the internal functioning of thousands of trade-unions having millions of members." H.R. Rep. No. 245, 80th Cong., 1st Sess. 76 (1947) (Minority Report); *see Beck*, 776 F.2d at 1216 (Winter, C.J., dissenting). As the dissenting panel opinion notes, the proceedings of this one case, requiring over nine years, over 4,000 pages of testimony, over 3,000 documents, two district judges and a special master, "exemplify

As I view it, the concurring opinion simply fails to appreciate the delicate compromise the Taft-Hartley Act managed to achieve. Congress considered the arguments of those who sought to prohibit all union security agreements, and those who wished to retain all such agreements, including the "closed shop." Senator Taft took a middle position, distinguishing between closed shops and the "union shop." Under his compromise, an employee could work at a unionized facility without acquiring membership, but only as long as he "pa[id] the same dues as other members of the union." 93 Cong. Rec. § 4400 (daily ed. April 30, 1947), *reprinted in* 2 Legislative History of the Labor Management Relations Act, 1947, at 1142 (1948). Senator Taft explained that the bill thus prohibited the closed shop and guaranteed that a worker could "get a job without joining the union or asking favors of the union . . . ." 2 Legislative History, *supra*, at 1422. Once assured of this right to work without union membership, however, Senator Taft asserted that "[t]he fact that the employee will have to pay dues to the union seems . . . to be much less important." 2 Legislative History, *supra*, at 1422. *See also id.* at 1010-11, 1096-97, 1403 (remarks of Senator Taft). Thus, the compromise that became law intended to permit union security agreements requiring nonmembers to tender the same dues to the union that members regularly paid. So far as payments to the union were concerned, members and nonmembers were on a parity and treated alike. In deciding whether to disturb this legislative solution, we should be guided by the Supreme Court's reasoning in Local 1976, United Brotherhood of Carpenters and Join-

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precisely the situation that Congress decided to avoid in defeating the amendment to supervise union dues collection." *Beck*, 776 F.2d at 1218 (Winter, C.J., dissenting). The result is identical, and equally offensive to Congressional intent, whether accomplished through the interpretation of § 8(a)(3), or the expansion of the duty of fair representation.

ers v. N.L.R.B., 357 U.S. 93, 99-100 (1958), deciding a secondary boycott issue:

> It is relevant to recall that the Taft-Hartley Act was, to a marked degree, the result of conflict and compromise between strong contending forces and deeply held views on the role of organized labor in the free economic life of the Nation and the appropriate balance to be struck between the uncontrolled power of management and labor to further their respective interests. This is relevant in that it counsels wariness in finding by construction a broad policy . . . when, from the words of the statute itself, it is clear that those interested in just such a condemnation were unable secure its embodiment in enacted law. The problem raised by these cases affords a striking illustration of the importance of the truism that it is the business of Congress to declare policy and not this Court's.

Thus I would conclude that when a union expends agency fees for purposes unrelated to collective bargaining, grievance adjustment, or contract administration, not otherwise specifically prohibited by the Act, such expenditures are not outlawed under the duty of fair representation.

Judges Hall, Phillips, and Sprouse authorize me to say that they concur in these views.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 83-1955

HARRY E. BECK, JR.; DORIS R. AMBROSE; JACQUELINE S. BRANDON; MARY ANNA COX; SALLY B. DIMAURO; RUE T.F. DOWNEY; KATHLEEN A. HEIL; JOHN J. HURLEY; HARRIETT LIPSCHULTZ; CLAY B. LUTZ; BARBARA MCGAUGHEY; ROLAND R. MERKLE; ETHEL T. MERRYMAN; DORIS J. MORROW; MARION F. NORTHROP; FRANCES M. PHILLIPS; VIVIAN REEDY; BARBARA A. RUSSELL; LOIS A. STALLINGS; HARRY B. SWARTZ, SR.,

Appellees,

versus

COMMUNICATIONS WORKERS OF AMERICA (C.W.A.), an unincorporated Labor Organization; C.W.A. COMMITTEE ON POLITICAL EDUCATION (C.W.A. COPE); C.W.A. DISTRICT II; LOCAL 2100 OF C.W.A.; LOCAL 2101 OF C.W.A.; LOCAL 2108 OF C.W.A.; LOCAL 2110 OF C.W.A.,

Appellants,

and

LOCAL 2350 OF C.W.A.; AMERICAN FEDERATION OF LABOR-CONGRESS OF INDUSTRIAL ORGANIZATIONS (AFL-CIO), a Federation of National and International Labor Organizations; AFL-CIO COMMITTEE ON POLITICAL EDUCATION; MARYLAND STATE AFL-CIO; AMERICAN TELEPHONE & TELEGRAPH, a Corporation; C & P TELEPHONE COMPANY OF MARYLAND, a Corporation,

Defendants.

No. 83-1956

HARRY E. BECK, JR.; DORIS R. AMBROSE; JACQUELINE S. BRANDON; MARY ANNA COX; SALLY B. DiMAURO; RUE T.F. DOWNEY; KATHLEEN A. HEIL; JOHN J. HURLEY; HARRIETT LIPSCHULTZ; CLAY B. LUTZ; BARBARA McGAUGHEY; ROLAND R. MERKLE; ETHEL T. MERRYMAN; DORIS J. MORROW; MARION F. NORTHROP; FRANCES M. PHILIPS; VIVIAN REEDY; BARBARA A. RUSSELL; LOIS A. STALLINGS; HARRY B. SWARTZ, SR.,
Appellants,

versus

COMMUNICATIONS WORKERS OF AMERICA (C.W.A., an unincorporated Labor Organization; C.W.A. COMMITTEE ON POLITICAL EDUCATION (C.W.A. COPE); C.W.A. DISTRICT II; LOCAL 2100 OF C.W.A.; LOCAL 2101 OF C.W.A.; LOCAL 2108 OF C.W.A.; LOCAL 2110 OF C.W.A.,
Appellees,

and

LOCAL 2350 OF C.W.A.; AMERICAN FEDERATION OF LABOR-CONGRESS OF INDUSTRIAL ORGANIZATIONS (AFL-CIO), a Federation of National and International Labor Organizations; AFL-CIO COMMITTEE ON POLITICAL EDUCATION; MARYLAND STATE AFL-CIO; AMERICAN TELEPHONE & TELEGRAPH, a Corporation; C & P TELEPHONE COMPANY OF MARYLAND, a Corporation,
Defendants.

Appeals from the United States District Court
for the District of Maryland, at Baltimore
James R. Miller, Jr., District Judge. (C/A M-76-839)

Argued: November 1, 1984. Decided: October 24, 1985

Before WINTER, Chief Judge, and RUSSELL and CHAPMAN, Circuit Judges.

Laurence Gold (James Coppess; George Kaufman on brief) for Appellants/Cross-Appellees; Edwin Vieira, Jr. (Joseph J. Hahn on brief) for Appellees/Cross-Appellants.

RUSSELL, Circuit Judge:

Plaintiffs in this suit are twenty non-union employees [1] of either the American Telephone and Telegraph Company (AT&T) or its subsidiary Chesapeake and Potomac Telephone Company (C&P) and, as such, are subject to an "agency shop" agreement [2] negotiated between the employers and the Communications Workers of America (CWA) and its locals as the exclusive bargaining agents of such employees under the terms of section 8(a)(3) of the National Labor Relations Act (NLRA), 29 U.S.C. § 158(a)(3).[3] Plaintiffs are required under the agreement to pay agency fees to CWA through its locals in an

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[1] A number of other employees joined as plaintiffs while suit was proceeding.

[2] Professor Cantor has explained that an agreement as authorized under § 8(a)(3) creates actually an "agency shop":

> Although the statutory language refers to union 'membership' as a condition of employment, the NLRA has been interpreted to refer to 'financial core membership' rather than full union membership. Thus what appears to be a union shop authorization is actually an agency shop authorization.

Cantor, *Uses and Abuses of the Agency Shop*, 59 Notre Dame L. Rev. 61 n.2 (1983).

[3] Plaintiffs' employers and the AFL-CIO were named as defendants in the complaint, but on motion they were dismissed as defendants leaving only CWA and its locals as defendants in the action. There is no appeal from this dismissal.

amount equivalent to the dues paid by union members. Their complaint is that defendants CWA and its locals have expended a part of their agency fees for purposes unrelated to "collective bargaining, contract administration, and grievance adjustment." Plaintiffs' claim such expenditures constitute a violation of their First Amendment rights of free speech and association justiciable under 28 U.S.C. § 1331 and 42 U.S.C. § 1983, and a violation of defendants' duty to fairly represent all employees justifiable under 28 U.S.C. § 1337 and 29 U.S.C. § 185(a).[4] Plaintiffs sought a declaratory judgment against defendants establishing the illegality of the excessive exactions, injunctive relief against continued illegal exactions by CWA and its locals, and monetary judgment for past illegal collections by CWA and its locals.

CWA alleged in its answer that "all actions taken by CWA defendants [were] consistent with the duties and obligations imposed [upon CWA] as recognized or certified collective bargaining representative of the plaintiffs under the National Labor Relations Act." They also asserted that plaintiffs were without standing to maintain the action, that plaintiffs had failed to exhaust available internal union remedies, that the court lacked jurisdiction over the subject matter of the action, and that the action was barred by the statute of limitations.

After informal discovery, defendant CWA moved to dismiss the action for failure of plaintiffs first to exhaust internal union procedures or, alternatively, for a stay

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[4] Jurisdiction in actions such as this are sometimes sustained under 28 U.S.C. § 1337, and at other times under § 185 of the Labor-Management Relations Act, 29 U.S.C. § 185, or under both. For an instance of an action maintained under § 185, *see Reid v. McDonnell Douglas Corp.*, 443 F.2d 408, 411-412 (10th Cir. 1971). The action, however, was later dismissed on the ground that the union had "adopted a complying intra-union remedy" in the form of a good faith rebate procedure. *Reid v. International Union*, 479 F.2d 517, 520 (10th Cir.), *cert. denied*, 414 U.S. 1076 (1973).

pending such exhaustion.[5] CWA submitted in support of the motion a resolution of the Executive Committee of CWA adopted on June 19, 1974. This resolution provided that:

> Any member or non-member who is covered by a collective bargaining agreement containing a 'Union Shop' or 'Agency Shop' provision shall have the right to object to the expenditure of a portion of dues or agency fees for activities or causes primarily political in nature, and shall be entitled to the refund of a portion of such dues under the terms, conditions and procedures contained in this statement of policy.

The resolution further provided that the Administrative Committee of the Executive Board of CWA should determine the approximate annual proportion of dues or agency fees spent for activities or causes primarily political in nature as of March 31st of each year. By affidavit, defendants said that for the year ending March 31, 1976, the impermissible expenditures for political purposes amounted to 7.63 percent of the fees collected. CWA also alleged that its auditors were attempting to arrive at, for use in succeeding years, a figure estimating the proportion of expenditures made by the unions for political purposes. Should any member or non-member object to the allocation determination, he could appeal to the Executive Board and from the Executive Board to the Union Convention.[6]

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[5] It is significant that defendants did not in their motion to dismiss raise the jurisdictional objection that plaintiffs' constitutional claim failed because of the alleged absence of "state action," though several years later, as we later note, they raised this point.

[6] There can be little doubt that this resolution had its genesis in *Brotherhood of Ry. and S.S. Clerks v. Allen*, 373 U.S. 113, 122 (1963), in which the Supreme Court, in dealing with objections to the exaction under the Railway Labor Act (RLA) of union dues to be used for impermissible purposes, threw out this observation: "The difficulties in judicially administered relief [in fashioning a

The district judge advised both parties that, preliminary to a hearing on defendants' motion for summary judgment based on their rebate procedure, he wished the advice of counsel on the impact of *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977) on the issues in the case. Counsel for CWA responded in a letter dated June 3, 1977 and incorporated as a part of the record in this case. After indicating that *Street*[7] and *Hanson*[8] arose under the RLA and that *Abood* dealt with public employees, CWA's counsel expressed the opinion that *Abood* was not directly in point. But he added:

> The principal opinion's discussion [in *Abood*] of national labor policy and decisions under the National Labor Relations Act would seem to indicate

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remedy for a violation under the RLA] . . . should, we think, encourage petitioner unions to consider the adoption by their membership of some voluntary plan by which dissenters would be afforded an internal union remedy." This idea was repeated in *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 240 (1977).

As a result of this observation, unions generally developed rebate schemes somewhat similar to that adopted by CWA and such rebate schemes became the first line of defense by unions in suits such as this one. Many of these rebate schemes, however, were fairer than the one involved in this case, where the right of appeal by the dissenting employees is restricted to a union-constituted body and never to an impartial board. *Cf. Ellis v. Brotherhood of Ry., Airline and S.S. Clerks*, 685 F.2d 1065, 1069 (9th Cir. 1982), in which "[a]ny employee who believes his or her rebate inadequate may appeal directly to an independent Public Review Board authorized to make final determinations on such appeals." The rebate scheme in *Ellis*, with its more impartial appeal scheme, was, however, found invalid on other grounds by the Supreme Court in *Ellis v. Brotherhood of Ry., Airline and S.S. Clerks*, —— U.S. ——, ——, 80 L.Ed.2d 428, 439 (1984). Prior to *Ellis*, courts had varied in their treatment of this defense. *Reid v. International Union*, 479 F.2d at 520; *Perry v. Local Lodge 2569*, 708 F.2d 1258, 1262 (7th Cir. 1983).

[7] *International Ass'n of Machinists v. Street*, 367 U.S. 740 (1961).

[8] *Railway Employee's Dept. v. Hanson*, 351 U.S. 225 (1956).

> that the principles of *Hanson* and *Street* interpreting the Railway Labor Act apply equally to non-railway employees. Several lesser courts have so held. The problem is that the Supreme Court appears to use the terms 'ideological purpose,' 'political purposes,' and 'purposes other than collective bargaining,' interchangeably. The Court gives little guidance as to which expenditures it considers to be refundable to an agency fee payor.

CWA's counsel concluded his letter with this statement:

> If plaintiffs are willing to agree that the Supreme Court decisions mean only that the Union defendants must make a provision for pro-rata refund of that portion of the dues dollar expended upon political activities, the procedure is in effect [under the resolution of the Executive Committee] and this case should be settled. If plaintiffs intend to insist upon a much broader interpretation of those expenses for which they feel they are not responsible, no settlement is in sight. . . . [and plaintiffs must proceed under the appeal procedure established by the resolution.] [9]

Plaintiffs did not agree to submission to CWA's internal union remedies and the matter came on for determination by the district judge. Finding exhaustion of internal union remedies not required,[10] the district judge proceeded to find that the agency shop agreement was valid subject to the limitation that CWA could not "collect and disburse [as the exclusive bargaining agent under such agreement] such 'agency fees' for purposes other than 'collective bargaining, contract administration, and

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[9] It will be noted that defendants did not in this letter raise or indicate that there was any jurisdictional defect in the proceedings.

[10] There is no appeal from this decision. The inadmissibility of the exhaustion defense, with its reliance on the union's rebate procedure, is therefore not an issue on this appeal.

grievance adjustment' without seriously implicating the first amendment rights of free speech and association of fee payors who object." *Beck v. Communications Workers*, 468 F.Supp. 93, 96 (D.Md. 1979) (quoting *Abood*, 431 U.S. at 225-226). On the basis of that finding, he denied defendants' motion to dismiss and granted a declaratory judgment that collections by the union from objecting employees in an amount "beyond that allocable to collective bargaining, contract administration and grievance adjustment" were illegal as violative of "the first amendment rights of the plaintiffs." 468 F.Supp. at 97. He ruled that it was necessary to determine "what proportion of the union's total expenditures is attributable to activities other than collective bargaining, contract administration and grievance adjustment," and, in that determination, he said: "[t]he burden of proving such proportion rests upon the union, but '[a]bsolute precision in the calculation of such proportion is not, of course, to be expected or required.'" *Id.* (quoting *Allen*, 373 U.S. at 122). Finally, he provided that if the parties were unable to agree within thirty days on the amount to be refunded under the guidelines as stated by him, the matter of allocation should be referred to a master for the purpose of determining "what portion of the agency fees the defendant has collected improperly."

Since there was no agreement between the parties on the proper allocation, a special master was appointed. At the initial hearings before him, the special master received twenty-eight days of testimony and argument as well as 2,100 documentary exhibits. In his first report, filed August 18, 1980, he found that only 19 percent of CWA's total expenditures were related to and were reasonably necessary for the proper effectuation of permissible purposes. The special master accordingly recommended that CWA be ordered to refund to plaintiffs 81 percent of the agency fees collected in the past and that CWA be enjoined from collecting from plaintiffs more

than 19 percent of the dues and assessments charged CWA members.

After the filing of the special master's report, CWA moved the district court to remand the matter to the special master. In support of the motion, CWA filed a memorandum stating:

> A re-reference is initially required because the master failed to determine the extent of the plaintiffs' financial obligation as to the 60% of the agency fees retained by the local union, although the issue was part of the reference to the master. Re-reference to the master is also appropriate because the national union is prepared promptly to provide a new basis for the determination of its future entitlement, a circumstance which the master recognized would warrant further proceedings and, upon proper proof, an injunction different from the terms proposed in the master's August 1980 report. *The national union proposes to meet the master's proof requirements by (1) offering a full return to the plaintiffs of their entire fee payment to the national union from its beginning in 1976 to the end of the present fiscal year [1980], and (2) utilization during the final third of the national union's 1980 fiscal year, which commences on December 1, 1980 of contemporaneous time records for officers and employees which will provide a basis for determination of the plaintiffs' financial obligation to the national union thereafter.* (emphasis added)[11]

Time for filing exceptions to the report of the special master was extended until after determination of the

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[11] Again, it is of interest that defendants at this point did not indicate that a jurisdictional problem existed. Actually, the statement of position suggested that defendants in effect conceded the partial invalidity of their collection and use of the dues-equivalent and thus conceded partial liability.

motion to recommit. In the meantime, Laurence Gold, Esquire, had been retained as lead counsel for CWA in this litigation. He wrote counsel for plaintiffs a letter dated October 16, 1980, made a part of the record in this proceeding, in which he proposed:

> As a result of my discussions with the CWA national union, I have now been authorized to advise you that the national offers to pay to the individual plaintiffs in the above-noted case the full amount of monies paid by them as agency fees to the defendant CWA national union from January 1, 1976 to date and to waive such fees through the balance of the national's current budget year, *provided* that the parties can agree upon, and the District Court will enter, an order which will preserve for review without any *res judicata* or estoppel effect all issues which either party may wish to raise with respect to: (a) Judge Blair's rulings regarding the expenditures which may and may not lawfully be charged to agency fee payors and (b) all rulings of the master other than his factual findings allocating expenditures in accordance with those rulings.[12]

The district judge proceeded to grant the motion to recommit, but in so doing, he identified precisely the issues to be addressed on the recommital and provided that those issues should be resolved without further testimony unless the special master "deems it appropriate." *Beck v. Communications Workers*, No. M-76-839, slip op. at 3 (D.Md. Jan. 19, 1981). In connection with the objection of defendants to the absence of specific findings on the liability of the local unions, the district judge directed the special master to make findings in response to these questions:

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[12] It will be noted that counsel made no reference to any claim of want of jurisdiction over the cause in their statement of the issues on which they wished to reserve the right to object.

> (1) What portion of the fees paid were retained by the local union defendants, and what portion was paid over to defendant CWA;
>
> (2) What percentag of the fees retained by each local union defendant is attributable to permissible expenditures, as outlined by previous order of this court.

Id. at 2-3. The special master was also directed to make these additional findings in connection with future injunctive relief:

> (1) Do the unions' current recordkeeping policies in any way alter the factual findings previously submitted to the court?
>
> (2) If so, what method of computation would most accurately reflect the percentage of fees collected which are properly allocable to permissible activities?
>
> (3) In what manner, if at all, may this computation procedure be made self-executing in order to compensate for future changes in union policies?
>
> (4) How should the final injunction be framed in order to accomplish the objection (sic) set forth in this order and the prior orders in this action? *Id.* at 3.

After taking additional testimony, the special master filed his supplemental report in September, 1981. In this report he proceeded to answer the specific questions addressed to him by the district court. He found, in response to the first two questions posed relating to the liability of the local unions, that his "calculations of applicable percentages of permissible and impermissible expenditures by CWA [were] applicable to and control the expenditures by the four Local Unions, i.e., Local 2100, Local 2101, Local 2108 and Local 2110, including, of course, the 60 percent of the fees in question retained

by the Local Union Defendants." He added that "[t]his is *implicit* in the calculations appearing in Appendix F attached to the Original Report." The special master excused any lack of detail in his original report in this regard because of his desire to avoid unduly expanding his report, "especially when the Special Master concluded that the same deficiencies in meeting the required burden of proof to establish expenditures made for the three permissible categories—collective bargaining, contract administration and grievance adjustment—applicable to the CWA expenditures were also applicable to the Local Union expenditures." He found that, "giving the locals the benefit of every doubt," he could not find that more than 19 percent of the locals' share of the exacted fees were used for permissible purposes under the guidelines earlier stated by the district judge. In response to the other questions with which he was directed to report, he found that the unions' current record-keeping policies did not in any way alter his previous factual findings. He found that the new system proposed by the unions for future allocation of permissible costs, as reviewed in the testimony, was 'generally sufficient, prima facie to enable CWA to meet its burden of proof [i.e., by the standard of "clear and convincing" proof]," provided certain defects and omissions, detailed by the special master, were corrected or supplied. He concluded, however, that the system of calculation could not be made self-executing and would require periodic monitoring.

CWA and the local unions filed exceptions to the initial report and the supplemental report of the special master. In general, the objections of both the national and the local unions present the same contentions. The objections to the special master's findings of fact are stated in broad language and are incorporated in two general claims: First, they claim "[t]he categories of rebatable expenditures [by defendants as found by the special master] are too broad in that they give plaintiffs credit

for CWA expenditures in addition to those for political and ideological activities unrelated to collective bargaining";[13] and second, the special master placed the burden of proof by "clear and convincing evidence" on the unions to establish the retainable portion of the agency fees paid by dissenting employees and drew inferences adverse to the unions for their failure to produce records.

Plaintiffs also filed objections to the special master's reports. In effect, they objected broadly that the special master had been too generous in its allowance of permissible expenditures by the unions against the claims of plaintiffs. They also found objectionable the conditional approval expressed by the special master of the union's proposed procedure for determining the amount of plaintiffs' agency fees to be refunded. Finally, they took exception to the special master's recommendation that plaintiffs "bear 19% of the costs of proceedings in which they are the prevailing parties."

On March 5, 1982, while the district judge was considering the objections of the parties to the special master's initial and supplemental reports, the unions petitioned for leave to file a Fed.R.Civ.P. 12(b)(6) motion for dismissal on the ground "that plaintiffs' complaint fails to state a claim upon which relief can be granted." In their memorandum in support of their motion, the unions referred to both plaintiffs' First Amendment cause of action and their claim that the unions' violated their duty of fair representation as set forth in plaintiffs' "Second Claim for Relief" appearing "in paragraphs 26, 27, and 28" of the complaint. Their position on the constitutional claim was that there was an absence of governmental action, which is a prerequisite for a justiciable First Amendment claim. They would fault the claim of a violation of the duty of fair representation

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[13] The exceptions do not identify specifically any expenditures which were improperly disallowed except those relating to "organizing."

because the agency shop is specifically authorized by statute, thereby validating the collection by the unions of the agency fees from dissenting non-union employees such as plaintiffs and that *after collection, the unions have "a due process right to spend the funds in any manner [they choose]."* (emphasis added)

The district court dismissed *sub silentio* defendants' 12(b)(6) motion and proceeded to sustain substantially the special master's recommendation with but slight variations. The court first corrected a mathematical error made by the special master, thereby increasing to 21 percent the amount properly chargeable to the agency fee payor plaintiffs. *Beck v. Communications Workers*, No. M-76-839, slip op. at 12-13 (D.Md. Aug. 9, 1983) (memorandum and order). Furthermore, the court modified the special master's recommended injunction by ordering CWA, after collecting 100 percent of the agency fees, to return to plaintiffs that percentage of such fees determined by an independent certified public accountant to be non-retainable as attributable to expenditures unrelated to collective bargaining, contract administration, and grievance adjustment. *Beck v. Communications Workers*, No. M-76-839, slip op. at 2-3 (D.Md. Aug. 9, 1983) (judgment). The district court also ordered CWA to maintain, for each fiscal year, an interest-bearing escrow account containing twice the amount determined in the previous fiscal year to be non-retainable. *Id.* at 3. In addition, the injunction provided that only if plaintiffs successfully challenged the amount determined to be non-retainable would CWA bear the cost of such challenge. *Id.* at 3-4. This appeal followed with both plaintiffs and defendants excepting to the rulings and conclusions of the district court. We address first the exceptions of defendants.

After six years of litigation, 4,000 pages of testimony, the introduction of over 3,000 documents, and innumerable hearings and adjudication of motions, defendants, in

their brief in this court, limit themselves to two claims of error, the first of which raises a question of a federal justiciable claim not advanced by defendants until they filed their motion for judgment under Rule 12(b)(6) made only after all evidence had been received and after the cause was ripe for disposition on the merits.[14] Their other claim of error relates to the standard of proof to be used in resolving plaintiffs' claim for a refund. The first claim of error by defendants to which defendants devoted almost eighty percent of their initial brief in this court, is directed at plaintiffs' claim that the collection and use of fees exacted of them by defendant unions under the authority of the agency fee agreement, for purposes other than those "germane to collective bargaining," are violative of plaintiffs' free speech and association rights under the First Amendment and their due process rights under the Fifth Amendment. Jurisdiction of such a constitutional action, plaintiffs opined, existed under 28 U.S.C. 1331. Defendants, on this appeal, contest that position. It should be emphasized at the outset that in raising this belated jurisdictional claim defendants do not dispute the factual base for plaintiffs' constitutional claim. The district judge found, within a

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[14] While the lateness of this claim may not be a bar to its consideration, nonetheless the failure of defendants to raise such contention until after all evidence had been taken and after defendants had consistently in the protracted proceedings acted on the assumption that there was jurisdiction of the subject matter is conduct not to be commended. Such delay places an intolerable burden on orderly and efficient judicial administration. They had earlier raised other defenses, all in vain, and CWA had actually offered on two occasions to rebate all collections of dues from dissenting non-union employees. The defense offered by defendants for their delay is that they did not raise the jurisdictional claim in 1979 because the jurisdictional ruling was unexpected. This excuse might have some credibility if defendants had acted promptly but to delay for years to raise the point undercuts the reasonableness of the excuse.

few months after this action was begun—on showings largely made by defendants themselves—that:

> In this case it is undisputed that the defendant union, CWA, has negotiated an 'agency shop' clause with the plaintiffs' employers which allows the union to collect dues-equivalent payments from the plaintiffs. . . . It is also clear that the plaintiffs object to the expenditure of their funds for purposes other than 'collective bargaining, contract administration, and grievance adjustment.' Finally, it is undisputed that CWA has spent and continues to spend an as yet undetermined fraction of its dues receipts and dues-equivalent agency receipts for purposes other than the three enumerated ones.[15]

Defendants have never contested those findings.

The legal basis asserted by defendants for this claim of lack of jurisdiction in the federal courts over the constitutional claim of plaintiffs is, to quote defendants' statement of their position in their brief, that "the plaintiffs' First Amendment claims fail because the defendant unions' negotiation of a union security clause valid under the National Labor Relations Act, as amended, and under applicable state law and the unions' expenditure of agency fees collected under such a clause is not state action subject to constitutional constraints." Brief for Appellants at 14. They concluded this statement of their position with: "If our position in this regard is accepted, the judgment of the district court should be reversed and the plaintiffs' constitutional claims should be dismissed." *Id.*

It would seem fair to assume from this statement of their position by defendants that, in their view, plaintiffs' case is restricted to a constitutional claim, and if

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[15] *Beck v. Communications Workers*, 468 F.Supp. 93, 96-97 (D.Md. 1979).

the constitutional cause of action fails for lack of jurisdiction, plaintiffs are without a federal judicial remedy. This assumption is further indicated by the failure of defendants in their initial brief even to notice or discuss plaintiffs' statutory claim. We take it that defendants posited that, since in their view the ruling of the district judge rested on constitutional grounds, the federal jurisdictional basis for judgment herein must stand or fall on whether jurisdiction can be sustained over plaintiffs' constitutional claim.

It is, however, a settled rule of appellate procedure "that a decision of the district court is not to be reversed if it has reached the correct result, even though the reason assigned by it may not be sustained." *See Stern v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 603 F.2d 1073, 1093 (4th Cir. 1979). The complaint herein states in separate counts not merely a cause of action charging a violation of the First Amendment in the compelled payment of the dues-equivalent under threat of loss of job, but also a cause of action under section 8 (a) (3) of the NLRA as construed by the Supreme Court, and related thereto, a violation by defendants of their duty of fair representation. Only if jurisdiction of these claims under section 8(a) (3) itself is non-existent would a dismissal of this action for lack of jurisdiction be appropriate. Nor would this result be different because the district court may have decided jurisdiction on the assumption that plaintiffs' action was based on the unconstitutionality of the compelled payments. If the judgment can be sustained because of jurisdiction over either the constitutional or the statutory claim of plaintiffs, the judgment will be sustained, though, as we later observe, courts prefer to decide the issue by a construction of the statute if confrontation of the constitutional issue can thus be avoided. That this is the accepted practice is illustrated by the decision of the Supreme Court in *International Association of Machinists v. Street*, 367 U.S. 740 (1961).

That case, which involved similar constitutional and statutory issues to those posed there under a similar statute and agency contract, was decided in the state court on constitutional grounds. On appeal, plaintiffs apparently pressed the constitutional claim. The Supreme Court, however, decided the case on statutory grounds, thereby avoiding review of the constitutional issue.

In their reply brief in this court, it is accordingly understandable that defendants chose not to persevere in their argument that the judgment herein must be reversed if the constitutional claim of defendants is not accepted, and defendants recognized the necessity of addressing the statutory claim, the maintenance of which did not require "state action." Since it seems clear to us that plaintiffs have stated a good cause of action for a violation of section 8(a)(3) of the NLRA redressable under 28 U.S.C. § 1337 and 29 U.S.C. § 185(a), as well as a claim of a violation of the duty of fair representation justiciable under 28 U.S.C. § 1331 and 29 U.S.C. § 185(a), we shall deal with this question before addressing the right of plaintiffs to maintain a constitutional claim on the same facts. We begin by considering both the language of and the legislative purpose of section 8(a)(3) of the NLRA, which provides the basis for plaintiffs' statutory claim.

Section 8(a)(3), added to the NLRA by the Labor-Management Relations Act of 1947 (Taft- Hartley Act),[16] provides permissive authority for an agreement between an employer and the exclusive union bargaining representative, selected in conformity with the terms of the NLRA, whereby employees are required to have union "membership" as a condition of employment, subject however, to the express condition that no employer could dis-

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[16] Act of June 23, 1947, ch. 120, Title I, § 101, 61 stat. 136, 140-141.

charge an employee "for nonmembership in a labor organization . . . if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership." 29 U.S.C. § 158(a)(3)(1983). The legislative purpose of section 8(a)(3), as evidenced in the legislative record, was twofold: First, Congress intended the elimination of the closed shop and the substitution of the union or agency shop; second, in response to the plea of the unions that the existing statute encouraged "free riders," employees who enjoyed the benefits of collective bargaining but shared none of the costs of the bargaining process, it included the "membership provision or requirement. *See* S. Rep. No. 105, 80th Cong., 1st Sess. 6-7 (1947); Legislative History of the Labor-Management Relations Act, 1947, at 413, 1422 (1948) (statements of Senator Taft); *Oil, Chemical & Atomic Workers International Union v. Mobil Oil Corp.*, 426 U.S. 407, 426 (1976) (Stewart, J., dissenting); *NLRB v. General Motors Corp.*, 373 U.S. 734, 740-741 (1963).

However, the "membership" requirement was quickly "whittled down to its financial core," because the Supreme Court found that "[t]his legislative history [of the statute] clearly indicates that Congress intended to prevent utilization of union security agreements for any purpose other than to compel payment of union dues and fees." *NLRB v. General Motors Corp.*, 373 U.S. at 742 (quoting *Radio Officers' Union v. NLRB*, 347 U.S. 17, 41 (1954)). Accordingly, "[i]f an employee in a union shop unit refuses to respect any union-imposed obligations other than the duty to pay dues and fees, and membership in the union is therefore denied or terminated, the condition of 'membership' for § 8(a)(3) purposes is nevertheless satisfied and the employee may not be discharged for nonmembership even though he is not a normal member."

NLRB v. General Motors Corp., 373 U.S. at 743.[17] Thus, the extent of the objecting employee's obligation under the union or agency contract is the payment of dues, and the legislative history reveals that the obligation to pay dues was, it would seem, directly related to the costs of the collective bargaining itself.[18]

Prior to 1950, railroad workers, on the other hand, had been denied the right to have a union or agency shop. They sought similar rights to those enjoyed by employees in other industrial fields under section 8(a)(3). Congress responded to this demand by enacting section 2, Eleventh of the Railway Labor Act (RLA).[19] Evident of its intention merely to give railway workers similar rights to those of other workers under section 8(a)(3), "Congress [in phrasing section 2, Eleventh] simply tracked the language of Section 8(a)(3) of the Taft-Hartley Act." T. Haggard, *Compulsory Unionism, The NLRB And The Courts* 115 (1977). Further, the legislative record is replete with responsible representations that the intent was to confer on railway workers simply the same rights other workers had under section 8(a)(3). *Id.* at 127. Senator Hill, the manager of the bill in the Senate, assured the Senate that the intention of section 2,

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[17] This follows the comments of Representative Klein that while the statute purports to allow a union shop, the practical effect of the statute's insulation of ousted members against being fired by the employer so long as dues were paid was to "allow only a requirement that dues be paid." Legislative History of the Labor-Management Relations Act, 1947, at 655 (1948).

[18] Professor Cantor in his article, *Uses and Abuses of the Agency Shop*, *supra* note 2, at 75 n.64 recognizes this:

> "Where Congress has authorized compulsory extraction of a fee from workers in a represented unit, the monies must be spent in a manner consistent with the purpose for which the fee is extracted, effective representation of workers."

[19] Act of Jan. 10, 1951, ch. 1220, 64 stat. 1238-1239, codified at 45 U.S.C. § 152, Eleventh (1983).

Eleventh was "merely to extend to employees and employers subject to the Railway Labor Act rights now possessed by employees and employers under the Taft-Hartley Act in industry generally." 96 Cong. Rec. 15,737 (1950). Senator Taft, the co-author of section 8(a)(3), was equally explicit. He declared during debate that section 2, Eleventh "inserts in the railway mediation law almost the exact provisions . . . of the Taft-Hartley law, so that the conditions regarding the union shop and the check-off are carried into the relations between railroad unions and railroads." 96 Cong. Rec. 16,267 (1950). *See also* S.Rep. No. 2262, 81st Cong., 2d Sess. 3, 5 (1950); H.R. Rep. No. 2811, 81st Cong., 2d Sess. 405 (1950).

As is obvious, it would be difficult, if not impossible, to find two statutes more identical in language and legislative purpose than section 8(a)(3) of the NLRA and section 2, Eleventh of the RLA.[20] It is inconceivable that two such statutes would be construed differently. For this reason it seems fair to assume that the construction given one by the Supreme Court would be equally applicable to the other, and we proceed on that basis in construing section 8(a)(3).

The first consideration of either of these statutes by the Supreme Court was in *Railway Employes' Department v. Hanson*, 351 U.S. 225 (1956). In that case, which involved a charge of unconstitutionality against section 2, Eleventh under the First Amendment free speech and association clause and the due process clause of the Fifth Amendment, the Court found the statute,

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[20] It is true there are differences between the RLA and the NLRA, and where there is "difference in the language and scheme of the two statutes" there will be differences in the application of the provisions of such Acts. *See Ruby v. American Airlines, Inc.*, 323 F.2d 248, 256 (2d Cir. 1963), *cert. denied*, 376 U.S. 913 (1964). This is not such a case. There is like statutory language and like legislative purpose here and, therefore, like statutory construction.

which authorizes the collection of a dues-equivalent from non-union, objecting employees by an exclusive bargaining representative of the employees, valid so far as the unions' use of the fees was for purposes "germane to collective bargaining" *Id.* at 235. The Court reserved ruling on the permissibility of the collection of the dues-equivalent from objecting employees "for purposes not germane to collective bargaining," though it was the clear implication of the decision that such use would be unconstitutional. *Id.* at 238.

Five years later in *International Association of Machinists v. Street*, 367 U.S. 740 (1961), the Supreme Court was directly confronted with the question whether a union, acting as the exclusive bargaining representative under an agency contract as authorized under section 2, Eleventh, could constitutionally collect and use the dues-equivalent from an objecting employee in the unit for "political purposes." The result of sustaining this argument would have been a decision rendering the statute unconstitutional. The Court found it unnecessary, though, to consider the constitutionality of the union's collection and use of the dues-equivalent under the statute because it held that it was "not only 'fairly possible' but entirely reasonable" to construe the statute itself in a way making it unnecessary to consider the statute's constitutionality. *Id.* at 750. In adopting this procedure, the Court was merely following a rule often applied and recently restated in *Ellis v. Brotherhood of Railway, Airline and Steamship Clerks*, —— U.S. ——, ——, 80 L.Ed. 2d 428, 439 (1984): "When the constitutionality of a statute is challenged, this Court first ascertains whether the statute can be reasonably construed to avoid the constitutional difficulty." The Court, accordingly, looked to the legislative purpose of section 2, Eleventh. *See United States v. Security Industrial Bank*, 459 U.S. 70, 82 n.12 (1982); *Buckley v. Valeo*, 424 U.S. 1, 79 n.106 (1976); *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973). Based

on its finding of the statute's legislative purpose, the Supreme Court held that, under section 2, Eleventh, unions were not vested with "unlimited power to spend exacted money" and they might not use such money to "support candidates for public office" or to "advance political programs" because those were not uses which help "defray the expenses of the negotiation or administration of collective agreements, or the expenses entailed in the adjustment of grievances and disputes." *Street*, 367 U.S. at 768.[21] The Court, however, limited its decisions to the union's "power to use [the dissenting employee's] funds to support political causes which he opposes," saying:

> We express no view as to other union expenditures objected to by an employee and not made to meet the costs of negotiation and administration of collective agreements, or the adjustment and settlement of grievances and disputes. *Id.* at 769.

This construction of section 2, Eleventh, as stated in *Street*, was restated in *Brotherhood of Railway and Steamship Clerks v. Allen*, 373 U.S. 113 (1963). In that case the Supreme Court said:

> Respondents' amended complaint alleges that sums exacted under the Agreement 'have been and are and will be regularly and continually used by the defendant Unions to carry on, finance and pay for political activities directly at cross-purposes with the free will and choice of the plaintiffs.' *This allegation sufficiently states a cause of action.* It would be impracticable to require a dissenting employee to allege and prove each distinct union political expenditure to

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[21] In *Ellis*, —— U.S. at ——, 80 L.Ed.2d at 436, the Supreme Court said that *Street* held that the RLA "does not authorize a union to spend an objecting employee's money to support political causes. The use of employee funds for such ends is unrelated to Congress' desire to eliminate 'free riders' and the resentment they provoked."

which he objects; it is enough that he manifests his opposition to *any* political expenditures by the union." *Id.* at 118 (emphasis added).

In *Ellis*, the Supreme Court followed *Street* and *Allen* in their statement of the principle that a statute challenged for unconstitutionality under the First Amendment may be sustained if, as a result of a reasonable narrowing construction consonant with the legislative purpose reflected in the statute, the constitutional objection may be removed or obviated. It found, as had the Court in the earlier cases, that the statute could reasonably be given such construction, and it proceeded to hold that expenditures from the dues-equivalent collected from objecting employees under an agency contract authorized by section 2, Eleventh could embrace expenditures "necessarily or reasonably incurred for the purpose of performing the duties of an exclusive representative of the employees in dealing with the employer on labor-management issues. Under this standard, objecting employees may be compelled to pay their fair share of not only the direct costs of negotiating and administering a collective-bargaining contract and of settling grievances and disputes, but also the expenses of activities or undertakings normally or reasonably employed *to implement or effectuate the duties of the union as exclusive representative of the employees in the bargaining unit.*" —— U.S. at ——, 80 L.Ed.2d at 442 (emphasis added). The Court then went beyond the holdings of its previous decisions, which had limited its interdiction of the use of the dues-equivalent to expenditures for "political activities" or "political expenditures" (*Allen*, 373 U.S. at 118-19), or "for the expression of political views, on behalf of political candidates, or towards the advancement of other ideological causes not germane to its duties as collective-bargaining representative (*Abood*, 431 U.S. at 235, or "for forcing ideological conformity or other action in contravention of the First Amendment" (*Hanson*, 351

U.S. at 238), or "to use [of the employee's] money to support political causes which he opposes" (*Street*, 307 U.S. at 768). Instead, the Court proceeded to identify more specifically certain expenditures which would be permissible and some which would not be permissible under the standards declared by the Court in the construction of section 2, Eleventh. Costs of national conventions, "refreshments for union business meetings and occasional social activities," publications "reporting [to employees] about those activities it can charge them for doing," and "litigation incident to negotiating and administering the contract or to settling grievances and disputes" were said to be permissible charges that could be legitimately made on a proportionate basis against objecting employees but not "organizing" expenditures, which are "outside Congress' authorization." —— U.S. at ——, 80 L.Ed. 2d at 442-445.

In the midst of its decisions construing section 2, Eleventh of the RLA, the Supreme Court dealt in *Abood v. Detroit Board of Education*, 431 U.S. 209, 223 (1977), with a state statute which authorized an agency shop under "a regulatory scheme which, although not identical in every respect to the NLRA or the Railway Labor Act, [was] broadly modeled after federal law." Accordingly, for guidance in construing that state statute "modeled" after section 8(a)(3) of the NLRA and section 2, Eleventh of the RLA, the Supreme Court looked to the decisions in *Hanson* and *Street* under section 2, Eleventh. *Id.* at 225. It observed that "insofar as the service charge is used to finance expenditures by the Union for the purposes of collective bargaining, contract administration, and grievance adjustment, those two decisions of this Court appear to require validation of the agency-shop agreement before us." *Id.* at 225-26. But Michigan law also "permit[ed] union expenditures [by the union under the agency shop agreement] for legislative lobbying and in support of political candidates." *Id.* at 215. The Su-

preme Court invalidated on First Amendment grounds the Michigan statutory authorization for the use of fees collected from an objecting employee for such purposes, saying:

> We do not hold that a union cannot constitutionally spend funds for the expression of political views, on behalf of political candidates, or toward the advancement of other ideological causes not germane to its duties as collective-bargaining representative. Rather, the Constitution requires only that such expenditures be financed from charges, dues, or assessments paid by employees who do not object to advancing those ideas and who are not coerced into doing so against their will by the threat of loss of governmental employment. *Id.* at 235-236.[22]

It is defendants' position, though, that the construction of section 2, Eleventh as first stated in *Street* and later reiterated in *Allen* and *Ellis*, is inapplicable in the construction of section 8(a)(3), despite their similarity in language and purpose, and despite the use of those cases, in construing a similar Michigan statute in *Abood*. In its discussion of the statute in *Abood*, the Court likened that statute to section 8(a)(3) and section 2, Eleventh and then said that the Michigan statute was to be construed as those two federal statutes had been construed in *Hanson* and *Street*. It is difficult, therefore, to see the force of an argument that *Street*, *Allen*, and *Ellis* are not as relevant to the construction of section 8(a)(3) as they are to the construction of section 2, Eleventh. If those decisions were relevant to the construction of the statute in *Abood*, they are even more relevant in construing a like federal statute.

And defendants appear to have conceded as much in their formal presentation of their position to the district

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[22] For a full critique of *Abood*, *see generally The Supreme Court, 1976 Term*, 91 Harv. L. Rev. 1, 158-198 (1977).

court in the letter of their counsel. In his letter of June 3, 1977, defendants' counsel advised the district court on the position of defendants thus: "The principal opinion's discussion [in *Abood*] of national labor policy and decisions under the National Labor Relations Act would seem to indicate that the principles of *Hanson* and *Street* interpreting the Railway Labor Act apply equally to non-railway employees." Moreover, one commentator suggested, even in advance of *Abood:*

> It is unlikely that the first amendment issue raised by political expenditures of forced contributions under the union's security agreements will be resolved in the private sector. The issue under the RLA has been mooted by *Street*, and the NLRA, which governs most other private employers, contains language authorizing union security agreements that is almost identifical to that in the RLA. Since the Supreme Court interpretated the RLA as prohibiting political expenditures, it would be almost certain to place a similar interpretation on that language in the NLRA.[23]

Even Professor Cantor, who is the most public critic of the limited use of union dues under an agency contract, supports this view. In his latest article, *Forced Payments to Service Institutions and Constitutional Interests in Ideological Non-Association*, 36 Rutgers L.Rev. 3, 41 n.219 (1984), he states:

> Although *Street* dealt only with RLA authorizations of a union shop, the NLRA provision contains virtually identical constraints. [citations omitted] RLA § 2 (11), adopted in 1951, was simply intended to confer on rail unions the same union security prerogatives conferred on industrial unions in 1947 in the Taft-Hartley Act. [citations omitted]

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[23] Blair, *Union Security Agreements in Public Employment*, 60 Cornell L. Rev. 183, 194 (1975).

> Thus, legislative history under both the RLA and the Taft-Hartley Act is relevant to assessing congressional intent in shaping the permissible bounds of union security provisions.

In Henkel & Wood, *Limitations on the Uses of Union Shop Funds After Ellis: What Activities are "Germane" to Collective Bargaining?* 35 Lab. L.J. 736, 743 (1984), the latest academic comment on the two statutes, the authors said:

> Second, it is apparent that *Ellis* will apply to claims brought under the NLRA. As noted in *Ellis*, Congress's purpose in allowing the union shop was to eliminate the free-rider problem, which arose from exclusive union representation. Congress favored exclusive union representations as a means of promoting labor peace. This notion of exclusive union representation 'underlies the National Labor Relations Act as well as the Railway Labor Act.' For this reason the policies behind the *Ellis* standard are just as applicable under the NLRA. The Ninth Circuit dealt with this issue in *Seay* [*Seay v. McDonnell Douglass Corp.*, 427 F.2d 996, 1003 (9th Cir. 1970)]. In that case the court noted: 'Both the applicable provisions of the Act [RLA] 45 U.S.C. [§ 152, Eleventh —and the applicable provision of the National Labor Relations Act—29 U.S.C. § 158(a)(3)—] are for all purposes here, the same.' It appears, therefore, that the scope of *Ellis* will extend to cases under the NLRA.

We conclude, therefore, that the two statutes, (i.e., section 2, Eleventh and section 8(a)(3) phrased similarly and expressive of the same legislative purpose, should be given the same construction. The defendants appear to argue, though, that the Supreme Court in *Street, Allen,* and *Ellis* in its construction of section 2, Eleventh was so motived by a desire to avoid finding the statute

under review unconstitutional that it gave the statute a skewed or "tortured" construction. They posit that the same "grave" constitutional question perceived by the Supreme Court to exist in connection with the construction of section 2, Eleventh did not exist in connection with the construction of section 8(a)(3). It followed under the defendants' syllogism that, in their view, *Street*, *Allen*, and *Ellis* were not to be given weight in construing section 8(a)(3). We do not find either of the grounds for this syllogism of the defendants valid. First of all, we disagree that the Supreme Court gave section 2, Eleventh an "unreasonable" or skewed construction in order to avoid confronting the constitutional issue. In construing section 2, Eleventh, the Supreme Court in *Street* carefully canvassed the legislative record in order to ascertain the legislative purpose of the statute and, on the basis of that examination of legislative purpose, it reached what in its considered opinion was an "entirely reasonable" construction of the statute. 367 U.S. at 750. In view of the strength of this construction ("entirely reasonable"), we are not prepared to find the construction given section 2, Eleventh by Justice Brennan in *Street* to be "tortured," to use Professor Cantor's term. Cantor, *supra* note 2, at 72. We would be properly hesitant to brand a construction of a statute adopted by the Supreme Court in three cases to be "skewed"; we believe the construction adopted by the Supreme Court was, as that Court said, one which was the "entirely reasonable" construction of the statute based on both its language and its legislative history.

Defendants' second reason, as included in their syllogism, seems to be, however, that the Supreme Court could not be expected to nor would it be impelled to give section 8(a)(3), in an action involving that section, the same construction it had given section 2, Eleventh, in an action involving only that statute, because the Court would not have been confronted with the same "grave"

constitutional question in the case of a challenge to section 8(a)(3) as it was when section 2, Eleventh was challenged. The rationale for this position is said by defendants to be that section 2, Eleventh explicitly pre-empted all contrary state law whereas section 8(a)(3) is inapplicable in any state which has enacted a right-to-work law under section 14(b) of the Taft-Hartley Act.[24] We are unable to see the force of this argument when the question arises in a state such as Maryland which has no right-to-work law and to which section 14(b) has no application. So far as this case is concerned, arising as it does in Maryland, there is no difference between a section 8(a)(3) constitutional challenge and the section 2, Eleventh challenge in *Street*. Section 8(a)(3) is just as effective and all-inclusive so far as employees in Maryland covered by the NLRA are concerned, as section 2, Eleventh is with respect to railway employees employed in Maryland. In fact, the purpose of enacting section 14(b) was to prevent pre-emption of state law in those states which should exercise the right given them by section 14(b) to be exempt from the authorization of section 8(3)(3). *Oil, Chemical & Atomic Workers International Union v. Mobil Oil Corp.*, 426 U.S. at 417. When the employees in Maryland, whether employed on the railroad or in other industrial installations have no rights secured under section 14(b) of the NLRA and are subject to practically identical statutory restrictions and limitations under section 8(a)(3) and section 2, Eleventh, it seems inconceivable that the Supreme Court would, in construing the two statutes, offer protection to one group of such employees and deny it to others because of some action taken by another state in enacting a statute under section 14(b) to protect only that latter state's employees. Actually, it is interesting that in *Abood*, where the Supreme Court faced the constitutionality of the agency shop clause directly, because the Michigan statute ad-

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[24] 29 U.S.C. § 164(b) (1983).

dressed public employees, it adopted the very construction of section 2, Eleventh declared by it in *Street* as the limit of constitutional power in permitting the exaction of the dues-equivalent from an objecting employee under an agency contract executed by an exclusive bargaining representative under the authority of a state or federal statute. This, it seems to us, demonstrates that it matters not under what statute the claim arises, for the result is the same.

Defendants also seek to cite other differences between section 2, Eleventh and section 8(a)(3) which render it improper to construe the two statutes similarly. The first of these differences is that prior to the enactment of section 2, Eleventh, the RLA prohibited the union shop whereas section 8(a)(3) of the NLRA permitted the union shop prior to the amendment made to that section in 1947 by the Taft-Hartley Act. It escapes us how the language of the two Acts prior to the additions of the provisions in question could effect the construction to be given the later amendments, expressed in similar language and intended to effectuate the same legislative purpose. Next, defendants find substantial differences because section 2, Eleventh allows union shop charges "for periodic dues, initiation fees, and assessments" and section 8(a)(3) uses the language "periodic dues and the initiation fees." When we consider the definition which the Supreme Court gave the term "assessment" in section 2, Eleventh of the Railway Labor Act, we perceive no reason to make any distinction between the two Acts so far as the issue involved in this case is concerned. Thus, in *Hanson*, the Court clearly stated that "[i]f 'assessments' are in fact imposed for purposes not germane to collective bargaining," they would be subject to the same restraints on use as would "dues." 351 U.S. at 235. In short, "assessments" add nothing to "dues" so far as an ability of the union to use either for "purposes not germane to collective bargaining." Fi-

nally, defendants find some significance in the fact that, during the development of section 8(a)(3), there was some discussion of placing a limit on "dues" or "initiation fees," but Congress determined ultimately not to do so, whereas in the later adoption of section 2, Eleventh the legislative history is silent on this point. The fact that in the legislative history of the earlier statute (section 8(a)(3)) there had been discussion of placing a dues limit in the statute, but Congress ultimately determined not to include or limit, whereas Congress, during the discussion preceding the later enactment of section 2, Eleventh never mentioned the subject of a limit on dues but followed the earlier statute in omitting such a limit, lacks any logical meaning to us. The addition of a specific limit on "dues" in the statute had been resolved when section 8(a)(3) was adopted. Unless Congress wished to depart from its view as adopted in 1947 in the consideration of section 8(a)(3), there was no point in reopening the matter when later Congress was considering enacting a similar statute for railway workers in section 2, Eleventh.

As their final thrust at the statutory claim of plaintiffs, defendants assert that plaintiffs' action, if sustainable, is within the exclusive jurisdiction of the National Labor Relations Board and that plaintiffs are without any justiciable remedy for the redress of this violation of their rights. Defendants conceded in their affidavits and motions, however, that a portion of the dues collected from plaintiffs by them was and will be used to finance political activities. The conscious use of such funds by the unions on their authority as the exclusive bargaining representative under the agency contract negotiated by them with the employer is not only a violation of the statute itself but also a violation of defendants' duty of fair representation. In either case, the action would have been within the jurisdiction of the district court under 28 U.S.C. § 1337. In *Street*, the Supreme Court made it

clear that under the federal labor law "a union's status as exclusive bargaining representative carries with it the duty fairly and equitably to represent all employees of the craft or class, union and nonunion." 367 U.S. at 761. And this duty has been interpreted "to require a union to represent fairly all the members of the bargaining unit for which the union is the exclusive agent, and this obligation in turn has been interpreted to include a specific duty to the unit's nonunion employees to establish procedures that will make sure that the employees are not forced to pay for union activities other than those the union undertakes in its agency role." *Hudson v. Chicago Teachers Union Local No. 1*, 743 F.2d 1187, 1191 (7th Cir. 1984).

Specifically, courts have held that the union, under its role of exclusive bargaining representative by virtue of the agency contract, violates this duty of fair representation by compelling payments of dues to be used for purposes "not germane to collective bargaining" unless the unions have established a rebate procedure that fully protects the nonassenting employees from illegal exactions. That defendants in this case have not established a rebate procedure that "adequately protected the nonmembers' right to avoid contributing to objectionable political purposes" is established by *Ellis. Champion v. California*, 738 F.2d 1082, 1086 (9th Cir. 1984), *cert. denied sub nom. Champion v. Deukmejian*, —— U.S. ——, 84 L.Ed.2d 367 (1985) (decided on the basis of *Ellis*). Under those circumstances, an action for violation of the duty of fair representation is not pre-empted by the National Labor Relations Act, for, as the Supreme Court said in *Amalgamated Association of Street, Electric Railway & Motor Coach Employees v. Lockridge*, 403 U.S. 274, 299 (1971):

> Indeed, in *Vaca v. Sipes*, 386 U.S. 171 (1967), we held that an action seeking damages for injury

> inflicted by a breach of a union's duty of fair representation was judicially cognizable in any event, that is, even if the conduct complained of was arguably protected or prohibited by the National Labor Relations Act and whether or not the lawsuit was bottomed on a collective agreement.

This same thought was expressed in *Smith v. Local No. 25, Sheet Metal Workers International Association*, 500 F.2d 741, 746 (5th Cir. 1974):

> In our judgment, union conduct may be consistent with or even unrelated to the terms of a collective bargaining agreement and yet violative of the duty of fair representation.

Such was the ruling in *Seay v. McDonnell Douglas Corp.*, 427 F.2d 996, 1000 (9th Cir. 1970), and *Reid v. McDonnell Douglas Corp.*, 443 F.2d 408, 411-12 (10th Cir. 1971).[25]

Jurisdiction over plaintiffs' statutory suit against defendant union under section 8(a)(3) and for breach of the duty of fair representation was properly invoked under 28 U.S.C. § 1337. Section 1337 provides, in pertinent part, that "[t]he district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce." The Supreme Court has held that the NLRA is an Act of Congress regulating commerce, *see Capital Services, Inc. v. NLRB*, 347 U.S. 501, 504 (1954), and a suit for the protection of rights protected by section 8(a)(3) and under the union's duty of fair representation is one arising under the NLRA, *see William E. Arnold Co. v. Car-*

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[25] On remand, the court in *Reid* found that the union had given proper protection by its rebate provision and therefore held that the union had not violated its duty of fair representation. *Reid v. International Union*, 479 F.2d 517, 520 (10th Cir. 1973). The correctness of this decision must be doubtful after *Ellis* in which the Supreme Court disapproved a similar rebate procedure.

penters District Council, 417 U.S. 12, 16 (1974); *NLRB v. Heyman*, 541 F.2d 796, 799 (9th Cir. 1976); *Anderson v. United Paperworkers International Union*, 641 F.2d 574, 576 (8th Cir. 1981); *Smith v. Local No. 25, Sheet Metal Workers International Association*, 500 F.2d 741, 748-749 (5th Cir. 1974); *Nedd v. United Mine Workers*, 400 F.2d 103, 106 (3rd Cir. 1968). *See also Storey v. Local 327, International Board of Teamsters*, No. 83-5747, slip op. at 11-13 (6th Cir. Mar. 29, 1985). In the case *sub judice*, plaintiffs pled jurisdiction under section 1337 and challenged CWA's expenditures both under section 8(a)(3) as construed by the Supreme Court and as violative of its duty of fair representation. Consequently, the district court properly exercised jurisdiction over this matter.[24] In addition, were this not so, it is difficult to find jurisdiction in *Ellis*, which was filed initially in the federal district court, just as this case. That case was exactly like this case, save that it was brought under section 2, Eleventh and this one under section 8(a)(3). But, as we have seen, the two statutes are to be construed alike and both give to objecting employees the same rights. If there was jurisdiction under section 1337 over a statutory claim under section 2, Eleventh in *Ellis* (and that could be the only basis for jurisdiction in *Ellis* since the Supreme Court found it unnecessary to consider the constitutional claim), by the same token there is jurisdiction over the statutory claim

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[24] Because jurisdiction was properly invoked under § 1337, we need not decide whether jurisdiction exists under § 301 of the Taft-Hartley Act, 29 U.S.C. § 185. However, in *Seay v. McDonnell Douglas Corp.*, 427 F.2d 996, 1000 (9th Cir. 1970), it was said that jurisdiction could be sustained under § 185 if the facts alleged or proved brought the action within the section. The undisputed facts in this case meet that test. *See Aguirre v. Automotive Teamsters*, 633 F.2d 168, 174 (9th Cir. 1980) ("'If facts giving the court jurisdiction are set forth in the complaint, the provision conferring jurisdiction need not be specifically pleaded'") (quoting *Williams v. United States*, 405 F.2d 951, 954 (9th Cir. 1969)); *Fristoe v. Reynolds Metal Co.*, 615 F.2d 1209, 1212 (9th Cir. 1980).

under section 8(a)(3) here. In short, jurisdiction can only be denied in this case if jurisdiction is to be denied in *Ellis*.

Kolinske v. Lubbers, 712 F.2d 471, 481-82 (D.C.Cir. 1983), has been cited as contrary to jurisdiction in this case. *Kolinske*, on its facts, may well be said not to raise an issue within the union's duty of fair representation or violative of section 8(a)(3). The question there involved was the appellee's eligibility to receive strike benefits during a strike. These benefits were not created under the agency contract with the employer; neither did they have statutory authorization; they "were developed by the union *solely* as an ancillary, supportive tool of collective bargaining"; they by the terms of their creation "were made available to any employee, whether member or non-member, who contributed to the fund and in some way manifested a willingness to help the union's collective bargaining activities" (in this case the strike); and "[e]ligibility for benefits was conditioned in many ways, and payment was based on family size and length of a strike." *Id.* at 482 (emphasis added). The appellee's claim in that case related to the union's rules of eligibility for benefits from a union-developed and union-created fund. Such a case is one entirely involving union internal policies. In this case, however, the union's rights and obligations arise out of an agency contract authorized under a federal statute. Under that federally authorized contract, the union derives its right to collect a service charge from objecting employees. The rights of the union thus derive from an agreement, the content of which—so far as the collection of the dues-equivalent—is controlled by federal law as described by the Supreme Court. The source of the union's authority in this case is not certain rules developed and set by the internal procedures of the union; its right to the service charge and its obligation in the use of the dues-equivalent collected for that purpose stem from an agency contract

that exists only by virtue of federal law. A violation by the union of its duties under such contract, is a clear breach of section 8(a)(3) and of the union's duty of fair representation, intended to protect against discriminatory or arbitrary action by the union.

Since we are satisfied that there is jurisdiction of the statutory action under section 1337 on the authority of *Street*, *Allen*, and *Ellis*, it would seem unnecessary for us to consider the constitutional basis for jurisdiction. Lest it be thought that we agree with defendants' contention that there is no such basis for jurisdiction in this case, we address briefly that issue. We add that we are convinced that there is governmental action sufficient to sustain jurisdiction. The Supreme Court found jurisdiction of the constitutional right of action under section 2, Eleventh in *Hanson*, which involved "private employment" as does this case. 351 U.S. at 232. Further, the constitutional claim dealt with a statute which, as we have seen, was similar in language and legislative purpose to section 8(a)(3). As *Abood* emphasizes, "the union shop, as authorized by the Railway Labor Act, also was found to result from governmental action in *Hanson*. The plaintiffs' claims in *Hanson* failed, not because there was no governmental action, but because there was no First Amendment violation." 431 U.S. at 226. If we assume that section 2, Eleventh and section 8(a)(3) are to be given the same interpretation, then it necessarily follows under *Hanson* that there is governmental action here sufficient to satisfy the requirements for governmental action.[27] And defendants apparently recognize this, for they have argued at some length, as we have seen, that there is a substantive difference in the two statutes.

As we have said, no difference in the two statutes can be found either in their language or in their proclaimed legislative purpose. Defendants, however, purport to find

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[27] *See Blair*, *supra* note 23, at 194.

a difference in the fact that section 14(b) of the NLRA applies to exclusive representation cases under the NLRA, and not to such cases arising under the RLA. As we have said earlier, section 14(b) provides that section 8(a)(3) in its authorization of the agency shop will not apply in cases arising in a state which has banned agency shops. There is no similar provision in the RLA, for section 2, Eleventh states explicitly that it supersedes any state law. Repeating what we said earlier: we are unable to find that this difference has any relevance in the caes before us. This action arises in Maryland, a State which has no right-to-work statute. So far as an agency shop under section 8(a)(3) in Maryland is concerned, it stands the same as the similar agency shop under section 2, Eleventh of the RLA. Section 14(b) applies in neither of those cases; the controlling law in both cases is the federal statute. The court in *Linscott v. Millers Falls Co.*, 440 F.2d 14, 17 (1st Cir.) *cert. denied*, 404 U.S. 872 (1971), put the matter accurately: "By section 14(b)'s necessary implication, federal approval, and hence federal enforcement [under section 8(a)(3)] will exist in those states that do not enact such a law."

Defendants purport to find some substance for their argument in what they declare is the permissiveness in section 2(a)(3). Whether there is an authorized agency shop under section 8(a)(3) in any state depends, they argue, upon the will of the state, which, by enacting a section 14(b) statute, can prevent the execution of a valid agency contract over employment in the state. Governmental action which can exist only by the permission of the state will not do, they declare. Defendants overlook that an agency contract, whether under section 2, Eleventh or under section 8(a)(3), is by definition permissive. It depends on the agreement of both the employer and the bargaining agent; unless both give their permission, there can be no agency contract under either statute. This is the reason Justice Douglas in *Hanson*

said: "The union shop provision of the Railway Labor Act is only permissive." 351 U.S. at 231. Of course, there is no federal jurisdiction until the employer and the union choose to invoke the authorization granted under section 8(a)(3). To that point their rights may be termed "permissive." But when they actually invoke section 8(a)(3) and execute an agreement under the statute, the obligations cease to be "permissive" and become compelled under the statute.

Abood is also supportive of governmental action. It arose out of a state statute, applicable to state employees, which was similar in language to both section 8(a)(3) and section 2, Eleventh, except in one particular: it allowed the union enjoying the rights under an agency contract to collect dues which could be used for lobbying or political purposes. That statute had been enacted because states are exempt from the NLRA's provisions, just as states enacting right-to-work statutes are exempt. *See* 29 U.S.C. § 152(2). Certain state employees assailed the constitutionality of the provision allowing the use of their "dues" for political or lobbying purposes. The state trial court sustained the statute, finding the clause permitting use of the exacted funds did "not violate the Federal Constitution." 451 U.S. at 215. On appeal of the state intermediate appellate court's decision reversing and remanding the trial court, the Supreme Court reversed. The Court began by stating: "To compel employees financially to support their collective-bargaining representative has an impact upon their First Amendment interests . . . [and may] well be thought . . . to interfere in some way with an employee's freedom to associate for the advancement of ideas, or to refrain from doing so, as he sees fit." 431 U.S. at 222. The Court found, however, that, because of "the legislative assessment of the important contribution of the union shop to the system of labor relations established by Congress," a "service charge" may be collected to such extent as it is

used to finance "expenditures by the Union for the purposes of collective bargaining, contract administration, and grievance adjustment" but not for political or lobbying purposes. *Id.* at 222, 225-226. It then addressed the question whether there is a difference between public and private employees in this area and dismissd the claim with this significant statement: "The differences between public and private-sector collective bargaining simply do not translate into differences in First Amendment rights." *Id.* at 232. It reiterated its construction of *Hanson*, as already quoted, to the effect that the union shop agreement authorized by the RLA was "found to result from governmental action." *Id.* at 226.

Governmental involvement and governmental action in this case, as *Abood* makes clear, is indisputable. The right of action herein has its roots in the national labor policy embodied in the NLRA and the Taft-Hartley Act and is a part of that legislated national labor policy, that, according to the opinion of the Supreme Court in *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 180 (1967),

> extinguishes the individual employee's power to order his own relations with his employer and creates a power vested in the chosen representative to act in the interests of all the employees. "Congress has seen fit to clothe the bargaining representative with powers comparable to those possessed by a legislative body both to create and restrict the rights of those whom it represents . . . ." *Steele v. Louisville & Nashville R. Co.*, 323 U.S. 192, 202 (1944).

That power of a union to exercise this compelling power as the exclusive bargaining representative of employees —both those approving and those objecting—in the unit stems from federal law. It is, as Justice Douglas said in *Hanson*, when referring to section 2, Eleventh, the "federal statute [which] is the source of the power and authority by which any private rights [of an objecting

employee] are lost or sacrificed. [citation omitted] The enactment of the federal statute authorizing union shop agreements is the governmental action on which the Constitution operates, though it takes a private agreement to invoke the federal sanction." 351 U.S. at 232. And, in *Ellis*, the Supreme Court reiterated this same point. It said:

> Only a union that is certified [under federal law] as the exclusive bargaining agent is authorized to negotiate a contract requiring all employees to become members of or to make a contribution to the union. Until such a contract is executed, no dues or fees may be collected from objecting employees who are not members of the union; and by the same token, any obligatory payments required by a contract authorized by § 2, Eleventh terminate if the union ceases to be the exclusive bargaining agent. —— U.S. at ——, 80 L.Ed. 2d at 442.[28]

Again, as the Court in *Hanson* said, the "sanction of government" is "put behind" an agency contract, whether under section 2, Eleventh or under section 8(a)(3), executed by the exclusive bargaining agent. 351 U.S. at 232 n.4. Justice Douglas, who had written the opinion in

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[28] Since oral argument, counsel for defendants have cited to us *Price v. International Union*, No. H-84-1221, (D. Conn. Apr. 11, 1985). That case is similar to the one under review here. In *Price* the Court found that there was no "governmental action". Its rationale for this conclusion was:

> The union security clause contained in the contract among the defendants here is part of a privately bargained contract among private parties. That clause would be permissible if both state and federal law were silent about such clauses, and the existence of a permissive, but not compulsory federal statute which may be preempted by contrary state law does not establish that the federal government is the source of authority for the clause. Slip op. at 12-13.

This reasoning contradicts the holding in *Ellis*, —— U.S. at ——, 80 L.Ed.2d at 442, quoted above in the text (p. 47).

Hanson, made this point more emphatic in his dissent from the denial of certiorari, in which Chief Justice Burger concurred, in *Buckley v. American Federation of Television and Radio Artists*, 419 U.S. 1093, 1095 (1974):

> When Congress authorizes an employer and a union to enter into union-shop agreements binding and enforceable over the dissents of a minority of employees or union members, it has cast the weight of the Federal Government behind the agreements just as surely as if it has imposed them by statute.

If we were to follow the defendants' reasoning, what the government has done by authorizing the agency shop in section 2, Eleventh and section 8(a)(3) and compelling either union membership or the dues-equivalent contribution as a condition of employment is to vest the union with the right and authority to collect dues to be used for, among other purposes, the support of political candidates, policies, and political ideologies without any right existing in non-consenting employees to a judicial forum for the protection of their First Amendment rights or their rights under section 8(a)(3). Such authority as the union has in this case is grounded directly on the power given it as a result of its status as bargaining representative under the federal statute and under an agency contract that in turn owes its status to another federal statute. When that power—power to collect against the employee's will—to collect the dues-equivalent and to use those funds in a completely unconstitutional way (i.e., for political and lobbying purposes) is exercised by the union entirely under federal authorization, it seems impossible not to find in such union action governmental action. It is true, the actor is the union, but the union acts only under the warrant of federal authority. The union wears the cloak of the government; in making its demands it acts under authority vested in it by the federal government. As Jus-

tice Douglas said in his concurring opinion in *Street*: "Since neither Congress nor the state legislature can abridge [First Amendment] rights, they cannot grant the power to private groups to abridge them." 367 U.S. at 777. There is, in our opinion, governmental action.

In this case, the two-part test set forth in *Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982) is fully satisfied. Unquestionably the deprivation in this case is "caused by the exercise of some right or privilege created by the State" and, since the statute clothes the union with the authority to exercise that power, the "conduct [of the union] is otherwise chargeable to the State." *Id.* at 937.

Defendants seek to find support for their contrary view in the recent cases of *Blum v. Yaretsky*, 457 U.S. 991 (1982) and *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982). *Blum* and *Rendell-Baker* both involved conduct by defendants which was clearly private. *Blum* involved a nursing home which was expected to meet certain regulatory requirements, but the transfer of patients, which was the subject of that action, was not within the regulations. In finding an absence of state action, the Court said: "[a] State normally can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State." 457 U.S. at 1004. That language delineates perfectly the difference between this case and *Blum*.

Rendell-Baker involved the discharge of a teacher by a private school receiving its support largely from public funds. However, it was expressly agreed between the public bodies and the school that the latter was private and its employees were not "city employees." 457 U.S. at 833. The decision to discharge the plaintiff was "not compelled or even influenced by any state regulation."

Id. at 841. That is again quite different from this case where all acts taken were compelled by federal statute.

Defendants also cite *United Steelworkers v. Weber*, 443 U.S. 193 (1979) and *United Steelworkers v. Sadlowski*, 457 U.S. 102 (1982). In *Sadlowski*, the Supreme Court found the challenged conduct valid. In *Weber*, the employer and the union added to their collective bargaining agreement an affirmative action plan. Such addition was purely voluntary, based on no statutory or regulatory authorization. As the Court remarked, such a plan did not involve state action. 443 U.S. at 200. Neither of these cases adds any force to defendants' objection to our finding of governmental action and thus jurisdiction over the plaintiffs' clearly established constitutional claim. It follows that, in our opinion, governmental action [29] and thus jurisdiction would exist in this case over plaintiffs' constitutional claim.

Satisfied that there is jurisdiction present on both the statutory and constitutional claims of plaintiffs, we turn to the defendants' second claim of error in the decision of the district court.

The only remaining issue in this case is directed at determining what expenditures made by the union out of the dues-equivalent collected under an agency contract executed pursuant to section 8(a)(3) were permissible against objecting non-union employees such as plaintiffs.

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[29] *Compare Linscott v. Millers Falls Co.*, 440 F.2d 14, 17 (1st Cir.), *cert. denied*, 404 U.S. 872 (1971), *Seay v. McDonnell Douglas Corp.*, 427 F.2d 996, 1000 (9th Cir. 1970), *Havas v. Communications Workers*, 509 F.Supp. 144, 148-149 (N.D.N.Y. 1981), and *Lykins v. Aluminum Workers Int'l Union*, 510 F.Supp. 21, 24-26 (E.D. Pa. 1980), *with Kolinske v. Lubbers*, 712 F.2d 471, 474-480 (D.C. Cir. 1983), *Hovan v. United Bd. of Carpenters and Joiners*, 704 F.2d 641, 642-645 (1st Cir. 1983), *Reid v. McDonnell Douglas Corp.*, 443 F.2d 408, 410-411 (10th Cir. 1971), *further proceedings*, 479 F.2d 517 (10th Cir.), *cert. denied*, 414 U.S. 1076 (1973), *and Price v. International Union*, No. H-84-1221, slip op. at 12-13 (D. Conn. Apr. 11, 1985).

The standard to be used in such determination was recently set forth by the Supreme Court in *Ellis*, by drawing upon and expanding upon the earlier decisions in *Street*, *Allen*, and *Abood*. *Ellis* said that objecting employees such as plaintiffs, from whom dues are collected and used under the agency contract, can only be charged for expenditures "necessarily or reasonably incurred for the purpose of performing the duties of an exclusive reprensentative of the employees in dealing with the employer on labor-management issues." —— U.S. at ——, 80 L.Ed.2d at 442. Under this standard, the objecting employees "may be compelled to pay their fair share of not only the direct costs of negotiating and administering a collective-bargaining contract and of settling grievances and disputes, but also the expenses of activities or undertakings normally or reasonably employed to implement or effectuate the duties of the union as exclusive representative of the employees in the bargaining unit." *Id.* The objecting employees are entitled to a refund of any amount collected of them by the union beyond these "costs."

The burden of proof in establishing the charges validly chargeable under this standard against the objecting employees rests on defendant unions. This was settled by *Allen*, in which the Supreme Court said:

> Since the unions posses the facts and records from which the proportion of political to total union expenditures can reasonably be calculated, basic considerations of fairness compel that they, not the individual employees, bear the burden of proving such proportion. Absolute precision in the calculation of such proportion is not, of course, to be expected or required; we are mindful of the difficult accounting problems that may arise. 373 U.S. at 122.

It is at this point in the analysis that the error claimed by defendants emerges. In determining whether the un-

ions met their burden, the special master applied the clear and convincing standard of proof, though the special master modified this somewhat by the language in *Allen* that absolute precision was neither expected nor required. Even as modified, though, this standard of proof conflicts with the standard set forth in *Ellis*, which is that of preponderance of the evidence. —— U.S. at —— n.15, 80 L.Ed.2d at 447 n.15.

Defendants' specific claim of error is that the special master used the improper standard of proof and that the district judge affirmed such use. It is clear that the special master erred in his standard of proof. However, it does not follow that all the conclusions of the special master, as affirmed by the district judge, must be vacated. Defendants identify no findings made by the special master and confirmed by the district judge which were made on the basis of this standard; they apparently would presume, however, nothing else appearing, that any finding of disputed fact was tainted by error due to the application of the incorrect standard. But, even accepting defendants' argument, it means that only those conclusions in which there was a dispute in the evidence are vulnerable to attack on the ground that the special master had weighed and resolved the facts by the use of an incorrect standard of proof. If the conclusion of the special master was one of law and required no evaluation of conflicts in evidence or if it was based on an absence of *any* evidence, the error in application of the incorrect standard of proof could not be said to have influenced the decision and would thus be harmless. Our problem, therefore, is to ascertain the findings or conclusions of the special master as confirmed by the district judge which may have been affected or influenced by the application of the incorrect standard of proof.

In doing this, however, we must recognize that there are two sets of defendants; one, CWA, the national union, and the other, the locals. The fee collected from

the employees under the agency contract was divided between the two on a 40-60% basis, respectively. The national and the local unions have made separate presentations and we must, therefore, deal separately with the expenditures of CWA and the locals. We shall begin with CWA's proof of expenditures.

CWA, through its expert witness, a certified public account, reviewed the expenditures made by CWA for the years in question and classified them under eight headings. The special master accepted the witness' listing of expenditures and the classifications within which he grouped these expenditures. He found no occasion in dealing with four of these classifications to inquire into the accuracy of the charges or the propriety of the classification. He did this because he found these groups to include charges impermissible against plaintiffs as a matter of law. He gave specific reasons in each instance for this disallowance. None of these reasons, we emphasize, represented a resolution of disputed facts but instead represented a determination that as a matter of law the expenditures were not chargeable to plaintiffs. We consider each of these disallowed categories of expenditures:

> (1) The first of these disallowed expenditures were those CWA itself classified as "political." It seems that CWA concedes the propriety of this disallowance. Had defendants not conceded the inadmissibility of these expenditures as charges against plaintiffs, *Street* would have compelled their disallowance.[30]

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[30] Professor Cantor has suggested that Congress in the Taft-Hartley Act banned the use of union fees in federal elections. Cantor *supra* note 2 at 72-76, 49 Notre Dame L. Rev. He argues that Congress thereby manifested its awareness of the problem and the fact that it did not include a similar prohibition in § 8(a)(3) of the Act indicates an intention by Congress not to prohibit such use in connection with that section. To sustain any

(2) The second category of expenditures found by the special master to be impermissible were "labor legislation" expenditures. This disallowance was based on two grounds: First, he found that in large part these expenditures covered costs of "lobbying efforts" by CWA "far remote . . . from collective bargaining, contract negotiation and grievance adjustment," for instance, "lobbying efforts on behalf of the adoption of the Panama Canal Treaty, and the Equal Rights Amendment." He suggested that there might have been some areas such as "the Telecommunications Act or Occupational Health and Safety Regulations" where "lobbying" would have some relevance, but the special master said CWA had made no effort to identify any such permissible "lobbying activities" or to offer any evidence in support. The disallowance seems justified under *Abood*.[31]

(3) "Community services" expenditures were also found inadmissible charges as a matter of law. In reaching that conclusion, the special master held that such expenditures did "not directly relate to, and are not reasonably necessary, in the opinion of the Special Master, for the proper effectuation of collective bargaining, contract administration and grievance adjustment." He added that First Amendment rights were involved in this situation because employees "may not approve of the particular charities

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such theory would be to reverse the decisions in *Street*, *Allen*, and *Abood*. We refuse the suggestion and choose to abide by the decision which the Supreme Court has reached in those cases dealing with § 2, Eleventh of the RLA which is similar to § 8(a)(3).

[31] In *Robinson v. New Jersey*, 741 F.2d 598 (3d Cir. 1984), the court appears to have sustained "lobbying" expenditures by public employees because of the unique relationship of public employees' working conditions, wages, etc. to legislation. It is not easy to reconcile this decision with *Abood*. However, we are not here concerned with public employees and the unique considerations which influenced the decision in *Robinson* are not present here.

receiving the largess of the Union" and the employees "may well have their own favorite charities . . . to which they may wish to contribute the portion of their agency fee payments allocated by the Union to charitable contributions." The disallowance seems to accord with the test stated in *Ellis*.[32]

(4) Finally, the special master disallowed what CWA identified as expenditures for "organizing." Incidentally, this is the only specifically disallowed class of expenditures which CWA claimed to be erroneous in its exceptions to the special master's report. However, *Ellis* held that such expenditures were not allowable charges against the objecting employees because "such expenditures are outside Congress' authorization." —— U.S. at ——, 80 L.Ed.2d at 444. The Supreme Court gave a number of reasons supporting their decision. These began with the statement of the legislative purpose of the enabling legislation: "We remain convinced that Congress' essential justification for authorizing the union shop was the desire to eliminate free riders—employees in the bargaining unit on whose behalf the union was obliged to perform its statutory functions, but who refused to contribute to the costs thereof." *Id.* at ——, 80 L.Ed.2d at 441-442. The Court concluded with this comment: "Organizing money is spent on people who are not union members, and only in the most distant way works to the benefit of those already paying dues. Any freerider problem here . . . is a far cry from the free-rider problem with which

[32] The only justification offered by CWA before the special master for the allowance of these expenditures as charges against plaintiffs was that such expenditures "creat[ed] a favorable climate of public sympathy and support when collective bargaining time arrives and particularly when there is a strike." We agree with the special master and the district judge that, under the test stated in *Ellis*, such expenditures were not "reasonably necessary . . . for the proper effectuation" of collective bargaining.

Congress was concerned." *Id.* at ——, 80 L.Ed.2d at 445.

The error in the standard of proof had no connection with the findings and conclusions on the chargeability of expenditures in these four categories and cannot provide a justification for a reversal. We therefore affirm the decision of the district court in approving the special master's disallowance of CWA's expenditures under the following four classifications made by defendants' accountant: "political," "labor legislation," "community services," and "organizing." There were four other classifications of expenditures identified by CWA's expert. One of these, headed "administrative," was a catch-all, spread out over the other seven classifications on a proportionate basis, and appears to create no problem. The other classifications in the grouping of expenditures were disbursements for "collective bargaining," "grievances," and "contract administration" purposes. The expenditures in these areas were also listed and identified as to their particular purpose by CWA. Some items of expenditures included in these areas were disallowed by the special master. Thus, he disallowed all expenditures listed under the heading of "Foreign Affairs." CWA had other expenditures identified for the purpose of "Defense Funds." Included in such expenditures was a substantial contribution to the United Mine Workers in support of their strike. This expenditure was disallowed by the special master. CWA had a grouping of expenditures in an area titled by it as "Publicity and Public Relations," which the president of CWA, according to the special master, classified as "Organizing." On that basis the special master disallowed the expenditures under this grouping. We agree with the special master's rulings on these disallowed items, as approved by the district judge. Their disallowance was made on the ground that such expenditures did not qualify for allowance under the rule as enunciated by the Supreme Court in *Ellis*. Such deci-

sions by the special master could not have involved in any way the erroneous standard for evaluating disputed questions of fact and are affirmed.

The other expenditures listed under the broad classifications of "collective bargaining," "grievance," and "contract administration," included various items such as "Convention and Related Committees," "Development and Research," "Professional Fees," and "Education." The differences between the special master and CWA did not concern the propriety of the titles. Unlike the situation in connection with the four classifications first discussed, where the items were disallowed as not admissible charges as a matter of law, it seemed that expenditures under these headings were reviewed on their facts. Most of these expenditures consisted of personal services. CWA's auditor relied in his compilation of these cost items on the estimate given him in interviews by the employees involved. CWA also called as witnesses some of the individuals involved to substantiate the charges. These witnesses confirmed the estimates of their time devoted to collective bargaining matters of the units involved here as shown on the auditor's figures. On cross-examination, however, these witnesses described their allocations of time to such duties as merely "guesses" and these witnesses were less than firm in their testimony. Moreover, CWA's accountant likened the problem of making a proper allocation of the employees' work time devoted to collective bargaining, grievance, and contract administration as difficult as "making a frog fly." He was unwilling to certify the charges. There were quite a number of employees, whose time was in whole or in part charged to collective bargaining, who were never called and gave no testimony on the expenditures listed covering the time they devoted to such collective bargaining. Because of the showing made by CWA, these charges were largely disallowed by the special master. On the record before us, it is not possible to determine whether the special master, in reaching this conclusion, applied a

"clear and convincing" standard of proof. For that reason, the allocation as it relates to these three classifications ("collective bargaining", "grievance," and "contract administration"), except for those items included therein specially found by us earlier to be improper charges ("Foreign Affairs," "Publicity and Public Affairs," and a part of the "Defense Fund") must be remanded to the district court.

On remand, we would assume the district judge will recommit the cause to the special master. It is to be hoped, however, that it will not be necessary on remand to take any extensive evidence. After all, the relevant evidence is already in the record. The problem is one of weighing the evidence by the proper standard of proof. It should be possible for this to be done promptly based largely, if not entirely, on the testimony already taken and without any great delay. This case has been pending for six years; it is time for it to be concluded. The parties' legal rights have been settled and the amount of monetary judgment is not large. The parties should cooperate to expedite the further resolution of this action.

Our discussion has so far dealt with the liability of CWA itself. It remains to confront the same issues as they relate to the local unions. Here the problem is the dearth of any reliable record of expenditures. In the opinion of the special master, the records of but one local union were sufficiently complete to give any reliable picture of the local's expenditures and this was for only one year. The special master accepted the records of this one local as typical of all the locals. The special master said he was unable to identify more than two percent of the local's expenditures which would have been admissible charges against plaintiffs. The other expenditures appeared to him to be inadmissible, but, even if the local was given the benefit of every doubt, it would be impossible, in his opinion, to regard as permissible charges against plaintiffs any more than the amount of

permissible expenditures allowable in favor of CWA (i.e. nineteen percent).

Obviously, the special master was not using a "clear and convincing" standard of proof in weighing the testimony on expenditures by the local unions. The problem, however, is that the special master reached his conclusion basically on his findings made in connection with CWA's expenditures, and, since we have remanded for further review on those findings, it would seem to follow that we must, under the same terms, remand the issue of the liability of the local unions.

We now turn to plaintiffs' objections. Their first contention on appeal is that the permanent injunction granted by the district court is statutorily inadequate. The injunction allows CWA to charge plaintiffs the full amount of regular member dues subject to reduction by an amount an independent certified public accountant later determines to be non-retainable. The injunction also makes provision for an interest-bearing escrow account which shall contain twice the amount determined in the previous fiscal year to be non-retainable. Plaintiffs contend the injunction permits CWA to use their agency fees for improper purposes, contrary to the holding in *Ellis v. Brotherhood of Railway, Airline and Steamship Clerks*, —— U.S. at ——, 80 L.Ed.2d at 438-439. On the contrary, the permanent injunction here at issue complies with the mandate of *Ellis*. In *Ellis*, the Supreme Court stated that a pure rebate approach, which permits a union to collect from agency fee payors full union dues subject only to later reduction, is statutorily inadequate because:

> [T]he union obtains an involuntary loan for purposes to which the employee objects.
>
> The only justification for this union borrowing would be administrative convenience. But there are readily available alternatives, such as advance re-

> duction of dues and/or interest-bearing escrow accounts, that place only the slightest additional burden, if any, on the union. Given the existence of acceptable alternatives, the union cannot be allowed to commit dissenters' funds to improper uses even temporarily.

Id. at ——, 80 L.Ed.2d at 439. While striking down the pure rebate approach, the Court explicitly approved of an approach incorporating an interest-bearing escrow account, similar to the injunction formulated by the district court in the case *sub judice*. Under the injunction prescribed by the district court, CWA will be unable to "commit dissenters' funds to improper uses even temporarily" because the escrow account is not subject to CWA control. Consequently, the permanent injunction prescribed by the district court adequately protects plaintiffs' rights because CWA will derive no benefit from the amount determined to be nonretainable.[33] *Hudson v. Chicago Teachers Union Local No. 1*, 743 F.2d 1187, 1197 (7th Cir. 1984).

Plaintiffs also contend that the permanent injunction is inadequate because it provides that only if an agency fee payor is successful in challenging the amount determined by an accountant to be non-retainable will the cost of the challenge be taxed to CWA. Plaintiffs contend that CWA should bear the cost of *any* challenge made to the amount determined to be non-retainable. In this respect, plaintiffs simply ask for too much. They have been granted an injunction prohibiting CWA from collecting amounts unrelated to CWA's duty to represent the em-

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[33] Plaintiffs further contend that only an advance reduction approach can adequately protect their statutory rights. This contention, however, is without merit, for the Supreme Court in *Ellis* expressly sanctioned either an advance reduction *or* an interest-bearing escrow account approach. Either approach is adequate, because each prevents a union from extracting a forced loan from non-consenting payors.

ployees in labor-management relations and it is clear that CWA will not benefit from amounts determined to be non-retainable. To burden CWA with the cost of any challenge to the non-retainable amount, however frivolous, would not only encourage meritless challenges but also unfairly burden the union's other dues-paying members. Plaintiffs' rights are adequately protected by reimbursement for the cost of a successful challenge to the non-retainable amount.

The judgment of the district court is accordingly

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

WINTER, Chief Judge, dissenting:

I dissent. Plaintiffs contend that use of their agency shop fees for purposes not directly related to collective bargaining, grievance adjustment, or contract administration violates both the first amendment and § 8(a)(3) of the National Labor Relations Act (NLRA), 29 U.S.C. § 158(a). I conclude that the statutory claim fails because § 8(a)(3) cannot fairly be read to impose such limits on a union's use of the fees its collects. I further conclude that the first amendment claim fails because the defendant unions' use of plaintiffs' fees does not constitute state action. I would therefore reverse and direct entry of judgment for the defendants based on plaintiffs' failure to state a claim upon which relief can be granted.

I. Statutory Claim

Plaintiffs argue that the unions' use of their agency shop fees violates an implied right under § 8(a)(3) of the NLRA "not to be required to pay money, over objection, for [the union's] expenses not directly related to collective bargaining, contract administration and griev-

ance processing." Brief for Appellee at 32. This construction of the statute finds no support in the express language of the statute. Section 8(a)(3) is part of the subsection listing employers' unfair labor practices;[1] plaintiffs read into the provision a limit on *unions*, the violation of which is *not* an unfair labor practice.[2] Nor

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[1] Subsection 8(a), as codified at 29 U.S.C. § 158(a), provides in pertinent part:

> (a) It shall be an unfair labor practice for an employer—
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> . . .
>
> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this subsection as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later . . .: *Provided further*, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership . . .

Actions constituting "an unfair labor practice for a labor organization" are listed in subsection 8(b).

[2] If plaintiffs simply raised this § 8(a)(3) claim as an unfair labor practice then the National Labor Relations Board would have exclusive jurisdiction. *See* San Diego Building Trades Council v. Garmon, 359 U.S. 236, 245 (1959). Plaintiffs have instead characterized the alleged violation of § 8(a)(3) for jurisdictional purposes as both a "Breach of Implied Conditions of Contract and Statute" and a breach of the statutory duty of fair representa-

does this construction find any explicit support in legislative comment on the meaning of the subsection. Plaintiffs nevertheless argue that their construction of § 8(a)(3) has the virtue of letting us avoid the state action question presented here. Before reaching a difficult constitutional question, they note, we must first ascertain whether a construction of the statute is fairly possible by which the constitutional question may be avoided. International Association of Machinists v. Street, 367 U.S. 740, 749 (1961).

I conclude that plaintiffs' proposed interpretation of § 8(a)(3) is not *fairly* possible, and that plaintiffs therefore have no statutory claim. Both the language of § 8(a)(3) and its legislative history show that Congress did not intend to limit the use of agency shop fees under the NLRA.[3] Further, the history and purpose of this provision differs from the history and purpose of the agency shop provision in the Railway Labor Act; thus the Railway Labor Act's limits on fee use should not be engrafted onto the NLRA's § 8(a)(3).

Congress enacted § 8(a)(3) as part of the National Labor Relations Act of 1935, 29 U.S.C. § 141 *et seq.* That Act permitted closed shop agreements—those requiring union membership as a precondition to employment—unless such agreements were prohibited by state law. *See* Colgate-Palmolive-Peet Co. v. National Labor Relations Board, 338 U.S. 355, 361 (1949). The Labor

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tion. Complaint at 18; Appellees' Supplemental Brief at 2-4. *See also* majority opinion, *ante* at 37-42. The proper interpretation of the NLRA, as shown *infra*, defeats plaintiffs' statutory claim, however stated; Congress simply did not intend to allow the external review of union expenditures that plaintiffs seek. *Cf.* Price v. International Union, U.A.W., No. H-84-1221, slip op. 15-18 (D. Conn. April 11, 1985) (complaint about union's use of agency shop fees would not support duty of fair representation claim).

[3] *See also* Cantor, Uses and Abuses of the Agency Shop, 49 Notre Dame L. Rev. 61, 72 ff. (1983).

Management Relations Act of 1947 (the Taft-Hartley Act) amended § 8(a)(3) to prohibit the closed shop. Section 8(a)(3), however, continued to permit agency shop agreements—those requiring all employees to pay the equivalent of dues—unless prohibited by state law.

In enacting the Taft-Hartley Act, Congress explicitly considered the union practice of spending dues and fees for various purposes not directly related to collective bargaining. One of the prominent witnesses at the congressional committee hearings, the movie director Cecil B. DeMille, testified on this issue, using the example of his own experiences:

> In my case the right of political freedom was invaded [by the union] when I was given the choice between working or paying a political assessment . . . Because I refused to pay a political assessment, I was deprived of the right to work.

Labor Relations Program: Hearings on S. 55 and S.J. Res. 22 Before the Committee on Labor and Public Welfare, 80th Cong., 1st Sess. 801, 797 (1947), *cited in* S. Rep. No. 105, 80th Cong., 1st Sess. 7 (1947). DeMille objected strenuously to such exactions. He suggested that permitting agancy show agreements would be sufficient to solve the "free rider" problem of employees benefiting from union activity without contributing to its cost. Such a provision, he urged, should "provide that the service charge must be fair and not excessive." He further urged that "[p]olitical assessments and improper levies should be absolutely banned in any case." *Id.* at 806.

Congress acknowledged the problem of the worker who "has been compelled to contribute to causes and candidates for public office to which he was opposed." H.R. Rep. No. 245, 80th Cong., 1st Sess. 4 (1947) ("House Report"). To remedy this problem the initial House bill proposed two solutions. First, the bill declared that "[m]embers of any labor organization shall have the

right to be free from *unreasonable* or discriminatory financial demands of such organization." H.R. 3020, 80th Cong., 1st Sess. § 7(b) (1947) (emphasis added). To implement this policy, the bill made it an unfair labor practice for a union

> to impose initiation fees in amounts in excess of $25 per member unless the Board shall find that initiation fees greater than that amount are reasonable under the circumstances; or to impose any dues or general or special assessments that are not uniform upon the same class of members, or are in excess of such *reasonable* amounts as the members thereof, whom such organization represents or seeks to represent as a representative under section 9, by a majority of those voting, after due notice to the membership, shall authorize . . .

H.R. 3020, 80th Cong., 1st Sess. § 8(c)(2) (1947) (emphasis added). The House Report suggested that "[w]hat is reasonable will depend upon the size of the organization, the wage rates of its members, the benefits it confers, the stability of membership and of employment in the trades and industries in which the members work and other relevant factors." House Report at 31.

Second, the bill amended the Federal Corrupt Practices Act to make it unlawful for a union "to make a contribution or expenditure in connection with" any political election, primary or political convention to select candidates. H.R. 3020, 80th Cong., 1st Sess. § 304(1947). This provision meant that unions could use direct contributions for election activities, but only if "the dues which [employees] pay into the union treasury are not used for such purpose." 93 Cong. Rec. 6440 (1947) (statement of Sen. Taft), *quoted in* United States v. CIO, 335 U.S. 106, 119 (1948).

The House bill's attempt to monitor the "reasonableness" of union fees was part of a general proposal to

enact a "bill of rights" to limit union power. *See* 93 Cong. Rec. 3581 (statement of Rep. MacKinnon). This proposal met with extensive criticism. The House Minority Report faulted the bill's attempt to subject unions "to an external control of purely internal functions which is without parallel when compared to any other form of voluntary association." The report noted in particular the "extreme restriction of the internal activities of the union" imposed by such provisions as "the regulation of initiation fees and dues." These restrictions, the Minority Report asserted, would be both unfair to unions and unworkable in practice:

> These regulatory measures are not an appropriate subject for Federal legislation. Attempts by the Board to secure these rights for employees and union members and to regulate these activities would be attempting the impossible, i.e., attempting a regulation of the infinite details involved in the internal functioning of thousands of tradeunions having millions of members. No standards are provided in the bill to guide the Board, and none exist in fact. *For years most of our State courts have carefully refrained from such interference* in the internal affairs of unions, *realizing both the encroachment on individual liberty* involved in thus attempting to regulate the inner functioning of voluntary associations *and the sheer impossibility of doing so effectively, wisely, and equitably.*

House Report at 76 (minority) (emphasis added). *See also* 93 Cong. Rec. 3586 (1947) (statement of Rep. Powell). Those opposing the "bill of rights" provisions, as these excerpts show, preferred a hands-off policy for both agencies and courts.

The provisions regulating the "reasonableness" of dues, § 7(b) and § 8(c)(2), did not survive in the bill agreed on by the Conference Committee. Instead, the final bill added § 8(b)(5), which made it an unfair labor practice

for unions to require initiation fees that the National Labor Relations Board "finds excessive or discriminatory under all the circumstances." 29 U.S.C. § 158(b)(5). The Senate conferees refused to agree to the House bill's "bill of rights" provisions,

> since they felt that it was unwise to authorize an agency of the Government to undertake such elaborate policing of the internal affairs of unions . . . without further study of the structure of unions. In the opinion of the Senate conferees the language [in § 8(a)(3)] which protected an employee from losing his job if a union expelled him for some reason other than nonpayment of dues and initiation fees, *uniformly required of all members*, was considered sufficient protection.

93 Cong. Rec. 6601 (1947) (statement of Sen. Taft) (emphasis added).[4]

Some congressmen still worried that even the new provision, § 8(b)(5), "would require the Board to determine whether union fees were excessive or discriminatory." 93 Cong. Rec. 6662 (1947) (statement of Sen. Murray). "For example," one senator suggested, "in determining whether a particular fee was excessive the Board may have to decide . . . whether expenditures authorized by the union such as donations to charity were proper." *Id.* at 6662. *See also id.* at 6655, 6673. Senator Taft, the sponsor of the bill, answered such comments with the observation that "[t]he express language of [§ 8(b)(5)] shows how unfounded such an argument is." The provision, he noted, "is limited to

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[4] Congress later did enact a "bill of rights" for employees, as part of the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. § 401 *et seq.* *See* United Steelworkers of America v. Sadlowski, 457 U.S. 102, 109 (1982).

initiation fees and does not cover dues."[5] 93 Cong. Rec. 7001 (1947). The purpose of § 8(b)(5), as the conferees made clear, was simply to prevent unions from continuing their closed shop monopoly of certain trades by charging exorbitant initiation fees to new employees who were not already union members. *See* 93 Cong. Rec. 6601, 7001 (1947) (statements of Sen. Taft).

Of the proposed provisions governing the use of regular dues and fees, only § 304 survived in the final bill.[6]

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[5] Subsection 8(b), as codified at 29 U.S.C. § 158(b), provides in pertinent part:

> (b) It shall be an unfair labor practice for a labor organization or its agents—
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> . . .
>
> (5) to require of employees covered by an agreement authorized under [§ 8(a)(3)] the payment, as a condition precedent to becoming a member of such organization, of a fee in an amount which the Board finds excessive or discriminatory under all the circumstances. In making such a finding, the Board shall consider, among other relevant factors, the practices and customs of labor organizations in the particular industry, and the wages currently paid to the employees affected . . . .

[6] Section 304 was codified as 18 U.S.C. § 610, and applied to all labor unions. By the time Congress amended the RLA in 1950, however, the provision had proven largely ineffective. The Supreme Court avoided holding § 304 unconstitutional only by giving it a very narrow construction. United States v. CIO, 335 U.S. 106 (1948). After this decision the government given constitutional doubts about the statute, brought almost no new indictments under § 304 until 1955, and in 1949 Senator Taft brought about the provision's repeal in the Senate (the House failed to take action on the bill). *See* Rauh, Legality of Union Political Expenditures, 34 S. Cal. L. Rev. 153, 158-59 (1961).

Congress repealed § 304 in 1976, replacing the provision with 2 U.S.C. § 441b, which prohibits the use of agency shop fees by labor organizations in connection with federal elections. 2 U.S.C. § 441b(b)(3). Plaintiffs have not pursued a claim here under this statute, which requires administrative proceedings for enforcement. *See* 2 U.S.C. § 437g(a).

This legislative history makes it clear that Congress explicitly delineated the types of union dues collection that it deemed impermissible: exorbitant initiation fees and fees spent for political elections. Congress went this far and no further; it excluded no other areas of expenditure from the union's power to collect dues under a union security agreement. And "[a]s a matter of statutory construction, the authorities appear uniform in holding that an explicit exclusion appearing in and specifically limited to one provision of a statute and not included in another provision of the same statute logically implies that the exclusion is inapplicable as to the latter provision." League to Save Lake Tahoe, Inc. v. Trounday, 598 F.2d 1164, 1171 (9 Cir.), *cert. denied*, 444 U.S. 943 (1979).

We cannot entertain a claim alleging a union's inappropriate use of funds without contradicting Congress' intent in the Taft-Hartley Act to avoid general external supervision of internal union matters. Those in Congress who opposed external supervision of union dues collection argued that it was invasive and impractical. Here the proceedings exemplify precisely the situation that Congress decided to avoid in defeating the amendment to supervise union dues collection. The proceedings for this single union have already required over 9 years, over 4,000 pages of testimony, over 3,000 documents, and over 50 motions filed in the district court. Two district judges, a special master, batteries of lawyers, and countless witnesses, stenographers and clerks have contributed their services to this project. Even now the accounting remains unfinished, as the majority has ordered a remand. This exhaustive inquest, into every jot and tittle of a union's finances and activities, is *not* what Congress intended in passing the Taft-Hartley Act.

The argument that § 8(a)(3) of the NLRA limits the use of agency shop fees relies heavily on the established interpretation of § 2, Eleventh of the Railway Labor Act

(RLA), 45 U.S.C § 152.[7] The Supreme Court has construed that provision to deny a union authority to spend dissenting employees' agency fees for purposes other than collective representation. *See Street*, 367 U.S. at 768-69; Ellis v. Brotherhood of Railway, Airline and Steamship Clerks, 80 L. Ed. 2d 428, 442 (1984). I do not agree that this interpretation of the RLA controls our interpretation of § 8(a)(3). "Even rough analogies [between the RLA and the NLRA] must be drawn circumspectly, with due regard for the many differences between the statutory schemes." Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co., 394 U.S. 369, 383 (1969) (footnote omitted). Here, despite the similarity of certain phrases in the RLA's § 2, Eleventh and the NLRA's § 8(a)(3), careful comparison of the NLRA and the

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[7] Section 2, Eleventh is part of a list of general duties established by the RLA. As codified at 45 U.S.C. § 152, this section provides in pertinent part:

> Eleventh. Notwithstanding any other provisions of this chapter, or of any other statute or law of the United States, or Territory thereof, or of any State, any carrier or carriers as defined in this chapter and a labor organization or labor organizations duly designated and authorized to represent employees in accordance with the requirements of this chapter shall be permitted—
>
> (a) to make agreements, requiring, as a condition of continued employment, that within sixty days following the beginning of such employment, or the effective date of such agreements, whichever is the later, all employees shall become members of the labor organization representing their craft or class: *Provided*, That no such agreement shall require such condition of employment with respect to employees to whom membership is not available upon the same terms and conditions as are generally applicable to any other member or with respect to employees to whom membership was denied or terminated for any reason other than the failure of the employee to tender the periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership.

RLA shows that the two provisions differ in terms of language, legislative history, and statutory purpose. The settled interpretation of the RLA therefore does not bind us here.

Congress enacted § 2, Eleventh in 1950, when it amended the Railway Labor Act. The Railway Labor Act as amended in 1934, unlike the National Labor Relations Act of 1935, prohibited closed and union shop agreements. As the time of the 1934 amendments, railroad unions urged Congress not to prohibit all union security agreements in their industry. Only one of the standard unions, however, had any security agreements in its contracts at that time; the rest remained committed to the principle of voluntarism despite their support for allowing such agreements. *Street*, 367 U.S. at 750-51, 753 n.8. Given this "strong and long-standing tradition of voluntary unionism," and the opposition of some legislators to the union shop, Congress embraced a "policy of complete freedom of choice of employees to join or not to join a union." *Id.* at 750.

The RLA ban on union security agreements continued until 1950, when Congress amended the Act to authorize union shop agreements whether or not permitted by state law. In pressing for this amendment, the railroad unions argued that it was "essentially unfair for nonmembers to participate in the benefits of [labor unions' activities] without contributing anything to the cost." Railroad witnesses emphasized that their collective bargaining costs were higher than those for other industries, since the RLA's complex administrative machinery "requires expense which is not known to unions in outside industry." Hearings on H.R. 7789, House Committee on Interstate and Foreign Commerce, 81st Cong. 2d Sess. 10 (statement of George M. Harrison, spokesman for Railway Labor Executives' Association), *quoted in Street*, 367 U.S. at 761-62. "This argument was decisive with Congress." *Street*, 367 U. S. at 762.

The legislative history of the 1950 RLA amendment is ambiguous on the issue of limiting unions' use of agency shop fees. Indeed, as the Supreme Court has noted in Abood v. Detroit Board of Education, 431 U.S. 209, 232 (1977), its opinion in *Street* "embraced an interpretation of the Railway Labor Act not without its difficulties." Two congressional committee witnesses, both railroad company representatives, did complain that the proposed RLA amendments would place no limits on unions' use of dues. *See Ellis*, 80 L. Ed. 2d at 440 n.9; *Street*, 367 U.S. at 767 n.16. "That Congress enacted [§ 2, Eleventh] over these objections arguably indicates that it was willing to tolerate broad exactions from objecting employees." *Ellis*, 80 L. Ed. 2d at 440.

The Supreme Court in *Street* nevertheless read into § 2, Eleventh a limitation on the railroad unions' power to use agency shop fees. In doing so, the Court pointed out that § 2, Eleventh was revised to meet the objections that the RLA as amended would not adequately protect the free speech rights of dissenting employees. *Street*, 367 U.S. at 765-66. The railroad unions responded to the concerns voiced about such employees by suggesting the addition of a proviso to prevent job loss for "employees to whom membership was denied or terminated for any reason other than the failure to the employee to tender the periodic dues, fees, and assessmnts uniformly rquired as a condition of acquiring or retaining membership." Railway Labor Act Amendments: Hearings on H.R. 7789 Before the Committee on Interstate and Foreign Commerce, 81st Cong., 2d Sess. 247 ("House Hearings"), *quoted in Street*, 367 U.S. at 765. The union president presenting this proviso, the *Street* opinion notes, suggested that the revision "remedies the alleged abuses of compulsory union membership as claimed by the opposing witnesses, yet makes possible the elimination of the 'free rider' and the sharing of the burden of maintenance by all of the beneficiaries of union activ-

ity." House Hearings at 253, *quoted in Street*, 367 U.S. at 765-66 (statement of George M. Harrison). To this protective proviso Congress "affixed . . . limitations." *Street*, 367 U.S. at 766.

The Supreme Court discerned in these revisions of § 2, Eleventh a "congressional concern over possible impingements on the interests of individual dissenters from union policies." This legislative history convinced the Court that

> Congress did not completely abandon the policy of full freedom of choice embodied in the 1934 [Railway Labor] Act, but rather made inroads on it for the limited purpose of eliminating the problems created bythe "free rider." That policy survives in § 2, Eleventh in the safeguards intended to protect freedom of dissent.

Id. at 767. The Court has found that a union's use of compelled dues for purposes other than its collective bargaining duties does not serve the "limited purpose" of eliminating the free rider problem, and is therefore an unjustifiable inroad on the policy of full freedom of employee choice violating § 2, Eleventh. *See id.* at 768-69; *Ellis*, 80 L. Ed. 2d at 441-42.

The legislative history and purpose of the NLRA and Taft-Hartley Act do not permit the same interpretation of § 8(a)(3). First, the NLRA never embraced the 1934 RLA's policy of "complete freedom of choice of employees to join or not to join a union" that "survives in § 2, Eleventh." *Street*, 367 U.S. at 750, 767. Rather, the NLRA's policy has been to leave the question of union shop agreements to state law. Hence the settled interpretation of § 2, Eleventh—based on the underlying policy of the 1934 Railway Labor Act where the statute and legislative history are ambiguous—does not control interpretation of a provision in the NLRA, which does not share the 1934 Railway Labor Act's underlying policy.

If the legislative purposes behind § 8(a)(3) and § 2, Eleventh were identical, one would expect that the Supreme Court in *Street* would have looked to the NLRA for guidance in interpreting § 2, Eleventh. The *Street* opinion, however, does not significantly rely on or discuss either the NLRA or § 8(a)(3). Instead, it focuses on the distinctive features of the railroad industry and the Railway Labor Act in construing § 2, Eleventh.

Second, the Taft-Hartley Act's legislative history, unlike the RLA's, is unambigous on the issue of limiting the use of union shop fees. Congress explicitly considered the problem of unions using compelled fees when it enacted the Taft-Hartley Act in 1947. Its response was to prohibit union spending in the particularly sensitive area of federal elections. It explicitly rejected amendments requiring more thoroughgoing supervision of union shop fees, however, as unjustifiably intrusive and unmanageable. We should respect this Congressional intent in construing § 8(a)(3). "We cannot press statutory construction 'to the point of disingenuous evasion' even to avoid a constitutional question." United States v. Locke, 53 U.S.L.W. 4433, 4437 (U.S. Apr. 1, 1985), quoting Moore Ice Cream Co. v. Rose, 289 U.S. 373, 379 (1933).

I reject the argument that § 8(a)(3) and § 2, Eleventh may not properly be construed differently The argument is grounded on remarks made by a few congressmen during the enactment of the RLA. But these remarks are only general comments about the similarity of the Taft-Hartley union security provisions, rather than explicit comparisons of § 8(a)(3) with the provisions of the RLA. Plaintiffs quote Senator Taft as declaring during debate that the bill "inserts in the railway mediation law almost the exact provisions . . . of the Taft-Hartley law, so that the conditions regarding the union shop and the check-off are carried into the relations between railroad unions and railroads." In fact, Senator Taft commented:

> In effect, the bill inserts in the railway mediation law almost the exact provisions, *so far as they fit*, of the Taft-Hartley law . . .

93 Cong. Rec. —— (1950), *reprinted in* Comm. on Labor and Public Welfare, 93d Cong., 2d Sess., Legislative History of the Railway Labor Act, as Amended (1926 through 1966) at 1134 (1974).

The conclusion that § 8(a)(3) and § 2, Eleventh are identical in purpose should not rest on such ambiguous comparisons. Indeed, comparing the language of § 8(a)(3) and § 2, Eleventh reveals several obvious differences. Section 8(a)(3) states what employers may do in making agency shop agreements; § 2, Eleventh states what employers and *unions* may do. Section 8(a)(3) prohibits employer discrimination against an employee if the employer has reasonable grounds for believing that an employee was denied union membershaip for an impermissable reason; § 2, Eleventh has no such explicit provision. Section 8(a)(3) allows termination for an employee's failure to pay "the periodic dues and the initiation fees" uniformly required from employees; § 2, Eleventh speaks instead of "periodic dues, initiation fees, and assessments (not including fines and penalties)." Section 8(a)(3) agency shop agreements may give employees 30 days to join the union); § 2, Eleventh provides for 60 days.

I also question placing much reliance on RLA legislative history to interpret a provision of the Taft-Hartley Act. It is better to focus on the history of the Act one is trying to interpret, rather than on a few remarks made during the debate on an entirely different bill. To me, the history of the Taft-Hartley Act itself is a surer guide to its meaning than general comments made years later, and I think that it supplies the answer to the issue of statutory construction that this case presents.

II. Constitutional Claim

Essential to plaintiffs' first amendment claim is a finding of state action.[8] "It is, of course, a commonplace that the constitutional guarantee of free speech is a guarantee only against abridgement by government, federal or state." Hudgens v. NLRB, 424 U.S. 507, 513 (1976). Thus the challenged use of agency fees is subject to constitutional scrutiny only if it is conduct "fairly attributable" to state or federal government. Lugar v. Edmondson Oil Co., 457 U.S. 922, 937 (1982). Plaintiffs do not argue that this conduct is fairly attributable to state government, and do not persuade me that it is fairly attributable to the federal government.

Defendants' use of agency fees is not fairly attributable to the federal government because it fails to satisfy the Supreme Court's two-part standard for determining the existence of state action. Under this standard, "the deprivation must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State is responsible." *Lugar*, 457 U.S. at 937. Further, "the party charged with the deprivation must be a person who may fairly be said to be a state actor." *Id.* at 937. These inquiries overlap to some extent, reflecting "the necessarily fact-bound inquiry" that confronts us. *Id.* at 939.

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[8] I do not think that defendants argue that federal courts lack jurisdiction of the plaintiffs' constitutional claim. Rather, they argue that, because the challenged union activity is not state action, plaintiffs have failed to state a cognizable claim. Thus defendants' belated motion to dismiss for lack of state action was brought under Fed. R. Civ. P. 12(b)(6) (failure to state a claim) rather than Rule 12(b)(1) (lack of jurisdiction). This was an appropriate way to raise the state action issue. *Cf.* Modaber v. Culpepper Memorial Hospital, Inc., 674 F.2d 1023 (4 Cir. 1982) (Russell, J.) (affirming dismissal for failure to state a claim because no state action).

The first step of the *Lugar* inquiry requires a determination of whether the alleged deprivation results from "the exercise of a right or privileges having its source in state authority." *Lugar*, 457 U.S. at 939. The agency shop agreement here, and the attendant use of the plaintiffs' compelled fees, do not result to any direct way from the exercise of such power. Nothing in the NLRA compels the adoption of an agency shop agreement; the Act simply provides that federal law does not "preclude" such an agreement between an employer and its employees' bargaining representative. 29 U.S.C. § 158(a)(3). Nor does the Act preempt contrary state law; it merely permits agency shop agreements where there is no state "right to work" law. 29 U.S.C. § 164(b). As the Senate Report on the original NLRA noted, "the bill does nothing to facilitate closed-shop agreements or to make them legal in any State where they may be illegal." S. Rep. No. 573, 74th Cong., 1st Sess. 11-12 (1935), *quoted in* S. Rep. No. 105, 80th Cong., 1st Sess. 6 (1947); *see also* Algoma Plywood & Veneer Co. v. Wisconsin Employment Relations Board, 336 U.S. 301, 308-10 (1949). The Taft-Hartley Act provided no significant encouragement to enter into union security agreements either, banning the closed shop and letting state law continue to determine the legality of the agency shop.

The NLRA's policy of neutrality regarding agency shop agreements does not make entering into such an agreement an exercise of a government-created right. "[I]t is well settled that a state's mere authorization of private conduct does not justify a finding of state action." Kolinske v. Lubbers, 712 F.2d 471, 478 (D.C. Cir. 1983) (holding hat NLRA's agency shop provision does not satisfy either part of *Lugar* test); *see also* Price v. International Union, U.A.W., No. H-84-1221 (D. Conn. Apr. 11, 1985) (same).

The only right exercised here that can in any way be said to "cause" the alleged deprivation is the right of an

exclusive bargaining representative to make a collective agreement with an employer that is binding on all employees. The exercise of this exclusive bargaining power, it is true, "causes" the alleged deprivation in the limited sense that, but for such power, the union would be less likely to secure an agency shop agreement and thus plaintiffs' fees. This causal link, however, is too attenuated to attribute state action to defendants here, as the second part of the *Lugar* approach makes clear.

The second *Lugar* inquiry is whether an NLRA union can "fairly be said to be a state actor." "Something more" is required to convert a private party into a state actor than the exercise of statutory rights. *Cf.* Flagg Bros., Inc. v. Brooks, 436 U.S. 149 (1978) (warehouseman's exercise of statutory right to sell goods on which storage charges not paid was not state action). Otherwise, "private parties could face constitutional litigation whenever they seek to rely on some state rule governing their interactions with the community surrounding them." *Lugar*, 457 U.S. at 937.

Monopoly status, which is what the right to be exclusive bargaining agent gives the union, is by itself insufficient to make a private party's acts state action. This issue was settled in Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974). The Supreme Court there held that government-conferred monopoly power alone was insufficient to establish state action in the context of a due process claim against an electrical utility. *Id.* at 351-52. The Court refused to find state action in suits against state-created monopolists where "there was insuffiicent relationship between the challenged actions of the entities involved and their monopoly status." *Id.* at 352.

The majority sees in the unions' monopoly status a nexus with the challenged actions sufficient to justify a finding of state action. It notes in particular the Supreme Court's recognition of the extent of union power in Steele v. Louisville & Nashville R. Co., 323 U.S. 192, 202

(1944): "Congress has seen fit to clothe the bargaining representative with powers comparable to those possessed by a legislative body . . . ." *See ante* at p. 47. This was exactly the argument made by the plaintiffs in United Steelworkers of America v. Sadlowski, 457 U.S. 102 (1982), but rejected by the Court. There plaintiffs challenged a union rule prohibiting nonmember contributions in union elections as, *inter alia*, state action violating the first amendment. The plaintiffs pointed to the monopoly power conferred on unions over a given employer's job market. They argued, also citing *Steele*, that because of its exclusive bargaining power the union was "clothed with power not unlike that of a legislature which is subject to constitutional limitations . . . ." Brief for Respondent Sadlowski at 48; *see also* Reply Brief for Petitioner Steelworkers at 9. The Court dismissed this argument in a footnote for lack of state action. *Sadlowski* at 121 n.16.

The existence of federal contract enforcement machinery in the NLRA is also insufficient to transform a union's activity into state action. Thus the Supreme Court detected no state action in United Steelworkers of America v. Weber, 443 U.S. 193 (1979). There plaintiffs challenged an enforceable collective bargaining agreement providing for affirmative action hiring. Before addressing plaintiffs' Title VII challenge, the Court stated that the challenged plan "does not involve state action." *Id.* at 200, *cited in Sadlowski* at 121 n.16; *see also* American Communications Association v. Douds, 339 U.S. 382, 402 (1950) ("We do not suggest that labor unions which utilize the facilities of the National Labor Relations Board become Government agencies or may be regulated as such.")

The lack of a sufficient nexus here between the government's involvement and the private party's challenged actions parallels the situation in Rendell-Baker v. Kohn, 457 U.S. 830 (1982).[9] There the Supreme Court rejected

[9] For further discussion comparing *Rendel-Baker* to the union situation, see *Kolinske*, 712 F.2d at 479-80.

the argument that extensive government regulation and 90% subsidization of a private school for problem students made the school a state actor. Several employees claimed that firing them for criticizing school policy violated the First Amendment. The Court refused to find state action, even though the state's continuing support of the school enabled it to limit the free speech of a certain portion of the labor force (teachers at the school). In finding no state action, the Court pointed to the interposed conduct of a private party exercising independent judgment; this judgment, rather than the government's involvement, yielded the challenged action. *Id.* at 839-42.

Here the independent judgment of employees, employers, and unions separates the potential for union monopoly bargaining power conferred by the federal government from the alleged free speech deprivation. I do not think that *Rendell-Baker* can be distinquished on the ground that the instant case is one in which the parties act under the compulsion of federal law. Federal legislation has not compelled the establishment of unions, nor has it compelled or even encouraged the adoption of agency shop agreements, as shown above. Indeed, the NLRA does not compel the acceptance of any collective bargaining terms. *See* 29 U.S.C. § 158(d). Rather, the employees, employers, and unions make these choices.

The NLRA differs in its general policy of neutrality regarding agency shop agreements from the Railway Labor Act. This case is therefore distinguishable from Railway Employees Dept. v. Hanson, 351 U.S. 225 (1956), which is asserted to compel a finding of state action in this case. There the Supreme Court found in the RLA the "something more" required to convert a union into a state actor. In that case plaintiffs sued to enjoin enforcement of a union security agreement in Nebraska, where a right-to-work law prohibited labor agreements from requiring union membership. The Court found governmental action because the RLA preempted

the state right-to-work law, and thus permitted the challenged union shop provision:

> If private rights are being invaded, it is by force of an agreement made pursuant to federal law which expressly declares that state law is superseded . . . In other words, the federal statute is the source of the power and authority by which any private rights are lost or sacrificed . . . .

Id. at 232. Because of the RLA's federal preemption, the Court concluded, "[a] union agreement made pursuant to the Railway Labor Act has . . . the *imprimatur* of the federal law upon it . . . ." *Id.* at 232 (emphasis added).

The basis for finding government action in *Hanson*—the federal imprimatur, or mark of approval, on agency shop agreements that the Supreme Court discerned in the preemption of all contrary state law—is lacking in the NLRA. The Court noted this distinction in *Hanson* itself:

> The parallel provision in § 14(b) of the Taft-Hartley Act . . . makes the union shop agreement give way before a state law prohibiting it.

Id. at 232 n.5. It noted the distinction again in *Abood*, emphasizing that federal preemption was the basis for finding government action:

> Unlike § 14(b) of the National Labor Relations Act, 29 U.S.C. § 164(b), the Railway Labor Act preempts any attempt by a State to prohibit a union-shop agreement. Had it not been for that federal statute, the union-shop provision at issue in Hanson would have been invalidated under Nebraska law. *The Hanson Court accordingly reasoned that government action was present* . . . .

Abood, 431 U.S. at 218 n.12 (emphasis added).

Lacking the preemption provision, the NLRA places no federal imprimatur on agency shop clauses. State law

rather than federal law is "the source of power and authority for such agreements" under the NLRA. The rationale for finding federal government action in *Hanson*, then, does not support such a finding here. Most courts have therefore found that *Hanson* does not compel a finding of state action for an agency shop agreement made under the NLRA or an analogous state statute. *See Kolinske*, 712 F.2d 471, 476 (D.C. Cir. 1983); Reid v. McDonnell Douglas Corp., 443 F.2d 408, 410 (10 Cir. 1971) ("[w]hatever the wisdom of this reasoning for the Railway Labor Act, it has no applicability to the National Labor Relations Act"); Linscott v. Miller Falls Co., 440 F.2d 14 (1 Cir.) (Coffin, J., concurring in judgment), *cert. denied*, 404 U.S. 872 (1971); *Price*, No. H-84-1221, slip op. at 11 (D. Conn. April 11, 1985); Pasillas v. Agricultural Labor Relations Board, 202 Cal. Rptr. 739 (Cal. App. 1. Dist. 1984) (following *Kolinske* and *Reid* in finding *Hanson* not to control state action question for state labor law patterned after NLRA). *But see* Seay v. McDonnell Douglas Corporation, 427 F.2d that *Hanson* controls finding of state action in NLRA 996, 1003 (9 Cir. 1970) (assuming without discussion context); *Linscott, supra* (majority opinion).[10]

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[10] The majority protests that the preemption distinction emphasized by the Supreme Court in *Hanson* and *Abood* is irrelevant. The present case, it notes, arises in a state that does not prohibit agency shop clauses, so that agency shops are permitted in Maryland under both federal acts. "So far as an agency shop under section 8(a)(3) in Maryland is concerned, it stands the same as the similar agency shop under section 2, Eleventh of the RLA." Majority opinion, *ante* at 44. Maryland law and the NLRA, however, merely permit private parties to negotiate an agency shop agreement. Neither Maryland law nor the NLRA encourages or requires such a provision, and, as noted above, "it is well settled that a state's mere authorization of private conduct does not justify a finding of state action." *Kolinske*, 712 F.2d at 478. The RLA, on the other hand, encourages agency shop agreements by preempting all contrary state law, and thus mandates a finding of federal government action under *Hanson*. *Hanson's* holding is not limited to states with a prohibition against railway agency shop clauses

The other case asserted to be controlling is *Abood*. There employees challenged the agency shop clause in a public sector collective bargaining agreement. A state statute patterned on the NLRA authorized such a clause. The Court assumed that this public employment contract involved state action. It upheld the use of agency shop fees to support collective bargaining, but found the use of such fees for political activities unconstitutional.

Abood is distinguishable on the state action issue because it involved the state in the roles of both legislator and employer. *See also Kolinske*, 712 F.2d at 477 (holding *Abood* distinguishable). I do not read the statement in *Abood* that "differences between public- and private-sector collective bargaining simply do not translate into differences in First Amendment rights," 431 U.S. at 232, as meaning that the differences between public- and private-sector bargaining do not translate into differences for *state action* purposes. Indeed, the obvious difference for state action purposes is that in the private sector case the state may merely authorize a private agreement. In the public sector cases, the state not only authorizes the agreement in its role as legislator, but affirmatively enters into such an agreement in its role as employer.

The *Abood* opinion compared the public sector case with the earlier private sector RLA cases "simply because the existence of governmental action in both contexts requires analysis of the free expression question". *Id.* at 226 n.23. The comment that "differences between public- and private-sector bargaining simply do not translate into differences in First Amendment rights" was a response to the argument that the greater *extent* of government action in the public sector case required more extensive first amendment safeguards than the government

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on the books for the RLA to preempt, since the RLA also has prevented states that might otherwise have enacted such a prohibition from doing so.

action in the RLA cases. *See id.* ("Hanson nowhere suggested that the constitutional scrutiny of the union-shop agreement was watered down because the governmental action operated less directly than is true in a case such as the present one.") At the same time, the Court explicitly noted that "[n]othing in our opinion . . . indicates that private collective-bargaining agreements are, without more, subject to constitutional constraints." *Id.*

It is for these reasons that I would reverse the judgment of the district court and direct it to dismiss the complaint.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

Civil Action No. M-76-839

HARRY E. BECK, JR., *et al.*

v.

COMMUNICATIONS WORKERS OF AMERICA, *et al.*

JUDGMENT

In accordance with the Memorandum and Order dated March 4, 1983 and the Memorandum of even date herewith, it is ORDERED and ADJUDGED:

1. That Judgment be, and is hereby, entered in favor of the plaintiffs and against the defendants in the following amounts plus interest:

Doris Ambrose	$341 + $102	= $443
Jacqueline Brandon	$341 + (−$81)	= $260
Rue Downey	$185 + 0	= $185
Kathleen Heil	$126 + 0	= $126
Clay Lutz	$185 + 0	= $185
Roland Merkle	$224 + 0	= $224
Doris Morrow	$104 + 0	= $104
Frances Phillips	$324 + $128	= $452
Lois Stallings	$324 + $627	= $951
Harry Swartz, Jr.	$328 + $91	= $419
John Hurley	$444 + $808	= $1252
Harriet Lipschultz	$442 + $648	= $1090
Barbara McGaughey	$87 + 0	= $87
Marion Northrop	$442 + $647	= $1089
Mary Anna Cox	$284 + $510	= $794
Ethel Merryman	$309 + $497	= $806
Vivian Reedy	$283 + $	= $283
Barbara Russell	$319 + $322	= $641

2. That Judgment is entered for the plaintiffs and against the defendants in the amount of $37,279.64 as reimbursement for the amount paid by the plaintiffs as compensation to the Special Master.

3. That the defendants shall pay costs.

4. That the CWA defendants, its officers, agents, and employees are permanently enjoined from retaining and from attempting to retain from the plaintiffs for the period April 1, 1983 to December 31, 1983, and for each fiscal year of CWA thereafter, the amount certified as non-retainable by an independent Certified Public Accountant commissioned by the CWA defendant who has used the system of recordkeeping and allocations designed by the experts of CWA as set forth on page 43 of the Supplemental Report of Special Master Wilson K. Barnes filed September 14, 1981 [hereinafter the "Supplemental Report"] after remedying certain defects and omissions set forth on pages 45 and 46 of the Supplement Report and subject to the additional provisions for monitoring set forth on pages 46 to 48 of that Supplemental Report. The plaintiffs through their counsel and an expert or experts selected by them shall have the right upon the issuance of such report to review the workpapers of the Certified Public Accountant and of the time recording and sampling expert who prepared the report, and who monitored the operation of the new system during the period involved. If, within 45 days from the date on which the plaintiffs have been granted access to those papers as above provided, counsel and the experts of the plaintiffs disagree with the methods used in the preparation of and the conclusions stated in the report, they shall file with the court a statement indicating the basis of such disagreement. If no such statement is filed, the CWA defendants on the 46th day after the issuance of the report shall pay to the plaintiffs the amount stated in the report. If such a statement is filed, the court on the papers or after such hear-

ing as the court may deem proper shall determine the non-retainable amount. The CWA defendants shall each fiscal year hold in an interest-bearing escrow account, a portion of the agency fees paid by each plaintiff equal to twice the amount determined in the previous fiscal year to be non-retainable pending the determination above set forth.

In the event that plaintiffs' review results in a determination that the amount initially certified as non-retainable by the independent Certified Public Accountant must be increased, the CWA defendants, as part of the monitoring expense for their new system, shall pay to the plaintiffs an amount of money representing the reasonable value of the services of counsel and the experts of the plaintiffs in connection with the review from time to time as above set forth. If the parties cannot agree upon the amount to be paid for such services, the plaintiffs may submit by motion the question of the amount of such reasonable compensation to the court for determination, which, after hearing the CWA defendants, will award a monetary judgment, if appropriate, to the plaintiffs for the amount determined by the court.

Dated at Baltimore, Maryland this 9th day of August, 1983.

/s/ James R. Miller, Jr.
JAMES A. MILLER, JR.
United States District Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil Action No. M-76-839

HARRY E. BECK, JR., *et al.*

v.

COMMUNICATIONS WORKERS OF AMERICA, *et al.*

MEMORANDUM

The plaintiffs have objected to what they consider to be two clerical errors in this court's Memorandum dated March 4, 1983. The first of these involves the calculation of impermissible expenditures. For the reasons stated in the March 4th Memorandum and for the reasons stated by the defendants in their response to the plaintiffs' motion, the court believes it employed the correct calculation.

The plaintiffs, defendants, and now the court all agree, however, that the initial calculation of rebates by the court should have indicated that it covered the period from January 1, 1976 to September 30, 1979, not from January 1, 1976 to August 18, 1980. The error will be compensated for in the computation of rebates for the second period which will begin from September 30, 1979.

The parties have stipulated to the amounts paid by the plaintiffs for the period from September 30, 1979, and the court will enter judgment for the plaintiffs for 79% of the fees paid for this period as well as the initial period. It will also award the plaintiffs the amount paid by them to compensate the Special Master.

All other costs should be sought by the procedures set forth in Rule 54, Fed. R. Civ. P., and the Local Rules of this court.

Finally, the parties have sought modification of the permanent injunction as drawn by the Special Master and approved by this court. The plaintiffs argue, once again, for material changes, some of which were rejected by this court and some of which were rejected by the Special Master previously. As this court indicated in its March 4, 1983 Memorandum, it believes the form of injunction drafted by the Special Master is appropriate. It has, however, considered the changes proposed by the defendants, and finding them to be minor, reasonable, and just, the court will incorporate them into the permanent injunction entered herein.

Judgment, including permanent injunctive relief, will be entered herein.

/s/ James R. Miller, Jr.
JAMES R. MILLER, JR.
United States District Judge

Dated: August 9, 1983.

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil Action No. M-76-839

HARRY E. BECK, JR., *et al.*,
Plaintiffs

v.

COMMUNICATIONS WORKERS OF AMERICA, *et al.*,
Defendants

MEMORANDUM AND ORDER

STATEMENT OF THE CASE

The complaint in this action was filed on June 4, 1976 by eighteen employees of various Maryland subsidiaries of the American Telephone and Telegraph Company (AT&T) and the Chesapeake and Potomac Telephone Company (C&P). The plaintiffs are employed under collective bargaining agreements between their employers and the Communication Workers of America (CWA). Under the contracts, CWA, CWA District II, and CWA Locals 2100, 2101, 2108 and 2110 are the exclusive representatives of the employees. Plaintiffs, while they have not sought to become members of CWA, are subject to the collective bargaining agreements which require that they pay to CWA, as a condition of employment, an amount equal to the periodic dues and assessments of the union.

The plaintiffs have alleged that their agency fees are, at least in part, used to support partisan political or ideological causes unrelated to collective bargaining. The plaintiffs have objected to such expenditures and to other non-collective bargaining expenditures, alleging a viola-

tion of their First Amendment right to express themselves without governmental control and without prior governmental restraint.

On March 16, 1979, the late C. Stanley Blair, a judge of this court, held that the plaintiff agency fee payors were entitled to a declaratory judgment that the requirement of the payment by them of fees to finance activities other than "collective bargaining, contract administration and grievance adjustment," was improper. The judgment order referred the case to a special master for determination of "the percentage of the defendant's budget dispersed for purposes other than the three permissible ones." (Paper No. 71). The judgment included provisions (1) that if the parties were unable to agree upon a master, the court would appoint one; (2) that if the parties were unable to agree on an equitable allocation of the cost of reference, the court would direct the master to make a recommendation; (3) that once the percentage of the defendant's budget dispersed for impermissible purposes had been determined, the plaintiffs would be entitled to a refund of the excess paid by the plaintiffs for the period since January 1, 1976; and (4) that the judgment was conditioned on the plaintiff's dismissal of the AFL-CIO and its named affiliates as defendants. The AFL-CIO and its named affiliates were dismissed, with prejudice, on March 30, 1979. The parties were not able to agree upon a master, and on May 3, 1979, Judge Blair entered an Order appointing Honorable Wilson K. Barnes as Special Master.

In his March 16, 1979 Memorandum and Order Judge Blair held as follows:

> "(1) Pursuant to the Agency Shop Clause in its collective bargaining agreement with plaintiffs' employees, the defendant, CWA, has collected and continues to collect from the plaintiff amounts beyond that allocable to collective bargaining, contract administration and grievance adjustment;

(2) That such collection by the defendant violates the First Amendment rights of the plaintiffs."

(Paper No. 70). The Special Master, on reference, was ordered to make the following determination:

> "The Special Master shall exercise those powers confererd by this Court and Rule 53 in making findings of fact and conclusions of law with respect to the amount of the agency fee paid by each of the named plaintiffs to the defendants since January 1, 1976 which is not allocable to (1) collective bargaining, (2) contract administration, (3) grievance adjustment, all in accordance with the conclusion of law heretofore reached by the undersigned judge in this proceeding."

(Paper No. 73).

On August 18, 1980, Special Master Barnes filed a written report (Paper No. 114), setting forth his findings of fact and conclusions of law in response to the referral order. The defendants subsequently filed a motion to recommit this matter to the Special Master pursuant to Rule 53(e). The motion was granted by the undersigned judge (Paper No. 130) on January 19, 1981.

The first issue resubmitted to the Special Master dealt with his findings relating to the obligations of the Local Unions. The court concluded:

> "The Special Master's report, however, is devoid of any specific findings or conclusions regarding the activities of the Local Unions. Given the fact that the Local Unions retain 60% of the fees in question, the court finds that this matter should be referred back to the Special Master either for clarification or further findings concerning the Local Unions. If the findings of the present report were intended to encompass the defendant locals, the basis of that holding should be set forth. If, on the other hand, the

report relates only to the portion of the fees expended by defendant CWA, the Special Master should submit further findings on the following issues:

> (1) What portion of the fees paid were retained by the local union defendants, and what portion was paid over to defendant CWA;
>
> (2) What percentage of the fees retained by each local union defendant is attributable to permissible expenditures, as outlined by previous Order of this court."

Further testimony on those issues was not required by the court unless Judge Barnes, in his role as Special Master, deemed it appropriate.

The second issue before the Special Master on recommital involved his determination of future injunctive relief. The Special Master's original report contained the following recommendation:

> "The plaintiffs listed in Schedule F are entitled to a permanent injunction restraining CWA, its officers, agents and employees from charging or collecting and from attempting to charge or collect from the plaintiffs in excess of 19% of the amount of dues, assessments or other payments payable by the members of CWA, subject, however, to modification by the Court upon a proper motion by CWA for such modification and the establishment by CWA at the time of hearing on such a motion that amounts in excess of such 19% were properly chargeable in the future to plaintiffs as Agency Fee Payors."

The court granted the defendants' motion to recommit the matter to a Special Master to enable the defendants to present additional evidence designed to modify the percentage figure for future injunctive relief. Specifically, the defendants sought to "present evidence to

the Special Master of modified bookkeeping procedures which would enable the unions to establish more accurately the percentage of expenditures on collective bargaining, contract administration, and grievance adjustment." (Paper No. 130 at 6). The court held that "[t]he injunctive relief regarding future collection should, however, be more flexible," (Paper No. 130 at 6), than that proposed in the Special Master's original report.

On remand the Special Master was requested specifically to submit additional findings on the following issues:

> "(1) Do the unions' current record keeping policies in any way alter the factual finding previously submitted to the court?
>
> (2) If so, what method of computation would most accurately reflect the percentage of fees collected which are properly allocable to permissive activities?
>
> (3) In what manner, if at all, may this computation procedure be made self-executing in order to compensate for future changes in union policies?
>
> (4) How should the final injunction be framed in order to accomplish the objection (sic) set forth in this order and the prior ones in this action?"

(Paper No. 130 at 7).

Finally, the Special Master was required to clarify his original findings with respect to clerical errors. (Paper No. 130 at 8).

On re-reference the Special Master held a series of conferences and hearings on the questions submitted. Detailed briefs were prepared by both sides and discovery was reinstituted, resulting in over 800 additional pages of transcript. The plaintiffs introduced 2,296 exhibits;

the defendants introduced 17 and additionally introduced extensive expert reports on CWA's proposed record keeping and accounting systems.

Special Master Barnes submitted his supplementary report (Paper No. 180) on September 18, 1981. The parties filed their objections to the report (Paper Nos. 184-86) and the defendants filed motions for action on the supplementary report (Papers 196, 197, 201). The plaintiffs responded to these motions (Paper No. 203). Finally, the defendants filed for leave to file a motion for judgment (Paper No. 204) with supporting memoranda (Papers 207, 208). The plaintiffs have opposed that motion (Paper Nos. 205, 208) and the defendants have replied (Papers 206, 210). The court has considered the motions and memoranda of the parties and has concluded that an oral hearing on these matters is not necessary. Local Rule 6(E).

OBJECTIONS TO THE REPORT OF THE SPECIAL MASTER

A. *Application of the Original Report to the Local Unions*

With regard to the first issue re-submitted to the Special Master, *i.e.*, findings related to the obligations of the local unions, the local unions, but not the plaintiffs, have objected (Paper No. 186) to the supplemental report. They object on the ground that the supplemental report, like the original report, allegedly fails to make findings with respect to the local unions.

"In an action to be tried without a jury the court shall accept the Master's findings of fact unless clearly erroneous," Fed. R. Civ. P. 53(e)(2). Thus, the task of the district court here in reviewing the Special Master's findings of fact is essentially the same task as faces an appellate court reviewing the findings of fact of a district court. *See* 5A *Moore's Federal Practice*, ¶ 53.12[4]

at 53-117 & 119. (2d. ed. 1982). Findings based on oral testimony, based partially on the fact finders' evaluation of witnesses' demeanor and credibility, are entitled to greater deference than are findings based on documentary and other non-demeanor evidence. *Id.* at 53-119. This is particularly true in a case such as this, where the testimony of numerous experts was so crucial.

In his supplemental report, the Special Master has made explicit his intention in the original report that the calculations of applicable percentages of permissible and impermissible expenditures by CWA should be applied also to the four local unions. Furthermore, the Special Master has complied with the court's request that the basis of his holding relative to the local unions be made specific. In pages 2 through 4 of the supplemental report, he explained that the local unions had failed to meet their burden of proof with respect to allocation of costs and that only by evaluating the evidence in the light most favorable to them could the Special Master justify an allocation equal to that of the CWA. The local unions' objection that the Special Master's findings are not supported by evidence (Paper Nos. 186 and 196) is without merit for it was their burden to produce evidence which the Special Master expressly found they failed to do. Furthermore, although the local unions now argue the remedy applied to the CWA is impractical to apply to them because of their smaller staffs and responsibilities, they failed to pursue this matter before the Special Master on recommittal. This court cannot say that the Special Master's findings are clearly erroneous on this issue. Therefore, the Special Master's supplemental report with respect to the calculation of permissible expenditures by the local union will be affirmed to the same extent it is affirmed for the CWA.

B. *Organizational Fees*

Defendant CWA objects to the Special Master's finding that the expenses of organization are not permissible.

The defendant relies principally on *American Steel Foundries v. Tri-City Central Trades*, 257 U.S. 184, 209 (1921), in which the Court outlined the importance of organizational activities to a healthy union. It is not disputed that organizing is an important function of the unions, nor that these activities may indirectly benefit unions' collective bargaining positions. The evidence before the Special Master, however, failed to support the conclusion that the fees attributable to organizing were used to benefit collective bargaining *in this case*. This is not to say that with proper evidentiary support a different conclusion would not be reached on other facts. *See Ellis v. Brotherhood of Railway Clerks*, 685 F.2d 1065 (9th Cir. 1982); *Browne v. Milwaukee Board of School Directors*, (Wisconsin Employment Relations Commission, Dec. No. 18408 (Feb. 3, 1981).

C. *Burden of Proof*

The CWA contends that the Special Master erred in imposing on the defendants the burden of proving permissible expenditures by clear and convincing evidence. Their first argument is that the defendant's burden as imposed by *Brotherhood of Railway Clerks v. Allen*, 373 U.S. 113, 122 (1963), should merely be one of going forward with the evidence, not one of persuasion. In support of this argument they cite the Title VII case of *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248 (1981).

The opinion of Judge Blair (Paper No. 70) leaves no doubt that the burden placed on the defendants was one of persuasion. For this reason alone, if for no other, the court believes the doctrine of the law of the case dictates that the burden not be shifted at this time. Additionally, *Burdine*, on which the defendants rely, was not decided at the time of Judge Blair's decision. In any event, *Burdine* involved a Title VII claim and no such claims have been raised here. This court does not agree with

the defendants' broad reading of *Burdine* which would apparently reassign to all plaintiffs in all phases of all actions the burden of proof. There is nothing in *Burdine* to justify its application beyond Title VII.

In addition, the defendant CWA argues that the Special Master erred in imposing a standard of "clear and convincing" evidence. Although this court agrees with the defendant and the Ninth Circuit, *Ellis v. Brotherhood of Railway Clerks, supra* at 1070, that the Special Master erred in relying on *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971), to support his conclusion that the appropriate standard was "clear and convincing evidence," the court disagrees with the conclusion that it was error to apply the standard at all.

In *Abood v. Detroit Board of Education*, 431 U.S. 209, 234 (1977), the Supreme Court cited *Buckley v. Valeo*, 424 U.S. 1 (1976), for the proposition that:

> "Contributing to an organization for the purpose of spreading a political message is protected by the First Amendment. Because '[m]aking a contribution . . . enables like-minded persons to pool their resources in furtherance of common political goals,' the Court reasoned that limitations upon the freedom to contribute 'implicate fundamental First Amendment interest.' "

431 U.S. at 234 (*quoting* from *Buckley*; citations omitted).

The Court then concluded that there was no significant difference for First Amendment purposes between limiting a campaign contribution and compelling contribution.

> "The fact that the appellants are compelled to make, rather than prohibited from making, contributions for political purposes works no less an infringement of their constitutional rights. For at the heart of

> First Amendment is the notion that an individual should be free to believe as he will, and that in a free society one's beliefs should be shaped by his mind and his conscience rather than coerced. . . ."

431 U.S. at 234 through 235 (footnotes omitted).

What is significant is that the Supreme Court held the expenditure limitations at issue in *Buckley* to "the exacting scrutiny applicable to limitations on core First Amendment rights of political expression," 424 U.S. at 44-45. *See* 424 U.S. at 16. This was consistent with numerous prior decisions determining that prior restrains on First Amendment freedoms carry a heavy presumption against their validity. *See, e.g., Heller v. New York*, 413 U.S. 491 (1973); *Blount v. Rizzi*, 400 U.S. 410 (1971); *Tetel Film Corp. v. Cusack*, 390 U.S. 139 (1968). Given the basic First Amendment freedoms at issue in this case and the solicitude with which the Supreme Court has protected them, the Special Master was justified in applying a "clear and convincing evidence" test in this action.

D. *Adverse Inferences*

The defendant CWA also objects to the adverse inferences drawn by the Special Master from the failure of the CWA to produce 30 employees of CWA to testify regarding their allocation of time to permissible projects. There is no contention here that the defendant could not produce the witnesses, and the Special Master found that the plaintiffs had produced evidence indicating that "most of the 30 employees mentioned . . . are presently engaged in activities which are not 'collective bargaining, contract administration, and grievance adjustment.'" (Paper No. 114 at 22). Thus, the adverse inference rule was correctly applied. *See Interstate Circuit, Inc. v. United States*, 306 U.S. 208, 226 (1939); *NLRB v. Chester Valley, Inc.*, 652 F.2d 263 (2nd Cir. 1981); *Blow v. Compagnie Maritime Belge*, 395 F.2d 74 (4th Cir. 1968).

The defendant CWA also contends that the Special Master drew impermissible adverse inferences from the failure of the CWA to maintain adequate time records as suggested in *International Association of Machinists v. Street*, 367 U.S. 740 (1961), and Allen, *supra*. While it is true that the Special Master admonished the CWA for failing to keep its time record (Paper No. 118 at 23-24), his decision was, nevertheless, based, not on adverse inferences from the non-production of such records, but on the finding that without them CWA failed to meet its burden of proof, *id.* at 24.

E. *Miscalculations*

The Special Master determined that the dollar amounts of permissible expenditures for collective bargaining, contract administartion, and grievance adjustment, equaled $4,424,000 in a total expenditure of $29,240,000. Likewise, the Special Master determined expressly that $5,052,000 of the total administrative expenses of $8,065,000 were permissible (Paper No. 114, Appendix D), but a portion of these "permissible" administrative expenses were attributable to impermissible activities in the same proportion that all non-administrative permissible activites bore to non-administrative impermissible activities. (The point raised by the plaintiffs (Paper No. 203 at 27) is well taken. The administrative expenses of $5,052,000 characterized as "*permissible*" should have been termed "allocable" to reduce confusion.) Therefore, the Special Master applied the calculation formula supplied by Dr. Bean, an expert produced by CWA, to arrive at the percentage of the total expenditures which constituted permissible expenses and applied that percentage to the allocable administrative expenses to arrive at that part of $5,052,000 which was attributable to collective bargaining, grievance adjustment and contract administration. The total of permissible expenses for collective bargaining, grievance adjustment and contract administration, or $4,424,000, was divided by the total expendi-

ture excluding cost of administration. The Special Master determined that this produced a figure of approximately 24%. (This finding is clearly erroneous as this calculation properly gives a figure of approximately 21%.) Based on the Bean formula, the percentage of allocable administrative cost of $5,052,000 attributable to collective bargaining, grievance adjustment, and contract administration was 24% or $1,212,000. The administrative costs attributable to collective bargaining, grievance adjustment and contract administration thus equaled $1,212,000. This figure added to the costs of collective bargaining, grievance adjustment and contract administration equaled $5,636,000. The percentage of $5,636,000 to the total expenditure is approximately 19% which the Special Master held was the percentage of permissible costs.

Application of the Bean formula has not been shown to be clearly erroneous, but the mathematical computation has. The percentage of permissible non-administrative expenditures to the whole should have been 21%. Twenty-one percent of $5,052,000 is $1,060,920 producing a total of permissible expenditures of $6,112,920 which produces a percentage of permissible expenditures of 21% ($6,112,920 divided by $29,240,000). The total impermissible expenditure is, thus, 79% (100% minus 21%).

F. *Application of Calculation to Years Other Than 1978*

The plaintiffs argued on recommittal that the 19/81 percentages (now 21/79) could not be applied to any year other than 1978. The Special Master concluded, however, that Dr. Bean's assertion that 1978 was a typical year was credible (Paper No. 114 at 8 and 13). The plaintiffs have cited the court to no evidence rebutting this finding and, therefore, the court does not find it clearly erroneous.

G. *Injunctive Relief*

All parties object to the injunction as proposed by the Special Master. (Paper 182 at 51-52). The defendants' proposed modifications are premised on issues addressed previously and need not be repeated here as the court has rejected them for the reasons stated. The plaintiffs' primary objection is that the proposed injunction is too vague to fall within the clear and precise standards applicable to First Amendment issues. The scheme accepted by the Special Master is admittedly not precise and clear, but it does fit within the stated expectations of the Supreme Court in *Allen, supra* at 122, that "absolute precision in the calculation of [the proportion of political to total union expenditures] is not, of course, to be expected or required; we are mindful of the difficult accounting problems that may arise." The Supreme Court's caveat is equally applicable in this constitutional challenge as it was in the statutory challenge before the *Allen* court.

The plaintiffs also take exception to the language of the Special Master which suggests how the defendants may meet their burden in the future. Such language is *dicta* and as such the court considers it, if erroneous, to be harmless.

H. *Costs Allocation*

The plaintiffs protest the allocation of 19% of the cost to them as prevailing parties. The court finds this protest well founded and pursuant to Rule 53(a), Fed. R. Civ. P., will direct that the defendants pay the entire amount of compensation of the Special Master.

I. *Clerical Errors*

There being no objection by any of the parties, the corrections of the two clerical errors noted in the court's Order of recommittal are adopted. (Paper No. 103 at 8).

CONCLUSION

The original report of the Special Master (Paper No. 114) as modified by the supplemental report of the Special Master (Paper No. 182) is adopted with the modifications expressed herein.

Judgment will be entered against the defendants and in favor of the plaintiffs for the agency fees paid from January 1, 1976 to August 18, 1980 in the following amounts:

Doris Ambrose	$340.89
Jacqueline S. Brandon	$340.89
Rue Downey	$184.86
Kathleen Heil	$126.40
Clay Lutz	$184.86
Roland Merkle	$224.36
Doris Morrow	$104.28
Frances Philips	$324.07
Lois Stallings	$324.07
Larry Swartz, Jr.	$328.26
John Hurley	$444.41
Harriet Lipschultz	$441.53
Barabara McGaughey	$ 86.90
Marion Northrop	$441.53
Mary Anna Cox	$283.63
Ethey Merryman	$308.50
Vivian Reedy	$282.82
Barbara Russell	$319.18

Judgment will also be entered for the plaintiffs listed above against the defendants for 79% of the agency fees paid for August 18, 1980 to March 31, 1983. By separate order, the plaintiffs will be required to submit affidavits setting forth the amount of agency fees paid during this period.

Judgment will also be entered in favor of the plaintiffs granting them permanent injunctive relief.

Judgment will be entered for plaintiffs against defendants for 100% of costs, including compensation of the

Special Master. Because the parties have to date each paid 50% of said compensation, the plaintiffs will be ordered to advise the court of the total compensation to enable the court to enter judgment for plaintiffs for the amount paid by them.

Accordingly, it is this 4th day of March, 1983, by the United States District Court for the District of Maryland, ORDERED:

(1) The plaintiffs shall submit affidavits setting forth the amount of agency fees paid from August 18, 1980 to March 31, 1983 within twenty (20) days of the date of this Order.

(2) The plaintiffs shall advise the court of the total compensation paid or owed the Special Master by them within twenty (20) days of the date of this Order.

(3) The Clerk shall mail a copy of this Memorandum and Order to counsel for the parties.

/s/ James R. Miller, Jr.
JAMES R. MILLER, JR.
United States District Judge

APPENDIX F

U.S. DISTRICT COURT
DISTRICT OF MARYLAND

No. M-76-839

BECK, *et al.*

v.

COMMUNICATIONS WORKERS OF AMERICA, *et al.*

January 19, 1981

MILLER, District Judge: —This action was filed by various non-union C & P Telephone Company employees to challenge the "agency fee" provision of CWA's contract with C & P. The "agency fee" provision requires that all non-union C & P employees contribute to CWA an amount equal to union dues in order to compensate for benefits which non-union employees receive as a result of union efforts. The plaintiffs allege that this provision violates their First Amendment rights in that portions of the fees collected are used for purposes other than collective bargaining, contract administration, and grievance adjustment.

On March 16, 1979, the late Honorable C. Stanley Blair entered an order in this case in which he held:

"(1) Pursuant to the agency shop clause in its collective bargaining agreement with plaintiff's employees, the defendant, CWA, has collected and continues to collect from the plaintiffs amounts beyond that allocable to col-

lective bargaining, contract administration and grievance adjustment;

(2) That such collection by the defendant violates the First Amendment rights of the plaintiffs,"

(Paper 70). This case was then referred to the Honorable Wilson K. Barnes, as Special Master, for a determination of the following:

"The Special Master shall exercise those powers conferred by this court and Rule 53 in making findings of fact and conclusions of law with respect to the amount of the agency fee paid by each of the named plaintiffs to fee paid by each of the named plaintiffs to the defendants since January 1, 1976 which is not allocable to (1) collective bargaining, (2) contract administration, and (3) grievance adjustment, all in accordance with the conclusion of law heretofore reached by the undersigned judge in this proceeding."

(Paper 73).

On August 18, 1980, Special Master Barnes filed a written report setting forth his findings of fact and conclusions of law in response to the referral order. (Paper 114). The defendants subsequently filed a motion to recommit this matter to the special master (Paper 118), which is presently pending before this court.

I. *Analysis of Defendants' Motion*

The defendants prpose that this matter be re-referenced to the Special Master, pursuant to Fed. R. Civ. P. 53(e), for the following purposes:

(1) To make a separate determination of the financial obligations of the Local union defendants to the plaintiffs.

(2) To determine amounts properly chargeable in the future by CWA, based upon the union's revised record-keeping procedures.

A. *Obligations of the Local Unions*

The defendants' principal basis for seeking an order referring this matter back to the Special Master is that the Special Master's report contains no specific findings or conclusions regarding the local unions. The defendants contend that the agency fees in question are initially paid to the defendant local unions which retain approximately 60% of the fees. The remaining 40% of the fees is paid over to the national union, CWA, by the locals.

In his report, Special Master Barnes concluded that "CWA has improperly charged the Agency Fee Payors 81% of the dues paid by them to CWA." (Paper 114, p. 39). The defendants contend that this finding relates only to that portion of the agency fee actually transmitted to CFA, i.e., approximately 40% of the total fee remitted. The defendants therefore seek a separate determination of the amount to be refunded out of the portions of the agency fees retained by the various local unions.

The plaintiffs contend that the Special Master's report implicitly holds that the 81%/19% ratio applies to all CWA units considered. The plaintiffs memorandum (Paper 121) goes on the summarize the testimony presented to the Special Master concerning the operation of the local unions. Based upon this information, the plaintiffs contend that the evidence presented justifies no greater charge against the plaintiffs than the 19% as determined in the special master's report.

[1] The Court has reviewed Special Master Barnes' report which contains a thorough and detailed analysis of defendant CWA's expenditures. The plaintiffs have proffered that the hearings before the Special Master took twenty-seven days, ten of which were devoted to testimony concerning the activities of the defendant local unions. Separate briefs were filed by defendant CWA and the defendant local unions. The Special Master's report, how-

ever, is devoid of any specific findings or conclusions regarding the activities of the local unions. Given the fact that the local unions retain 60% of the fees in question, the court finds that this matter should be referred back to the Special Master either for clarification or for further findings concerning the local unions. If the findings of the present report were intended to encompass the defendant locals, the basis of that holding should be set forth. If, on the other hand, the report relates only to the portion of the fees expended by defendant CWA, the special master should submit further findings on the following issues:

(1) What portion of the fees paid were retained by the local union defendants, and what portion was paid over to defendant CWA;

(2) What percentage of the fees retained by each local union defendant is attributable to permissible expenditures, as outlined by previous order of this court.

Further testimony on these issues is not required unless Special Master Barnes deems it appropriate.

B. *Determination of Future Injunctive Relief*

The defendants seeks a modification of the Special Master's proposed conclusion of law regarding injunctive relief. The Special Master's report contained the following recommendation:

"The plaintiffs listed in Schedule F are entitled to a permanent injunction restraning CWA, its officers, agents and employees from charging or collecting and from attempting to charge or collect from the plaintiffs in excess of 19% of the amount of dues, assessments or other payments payable by the members of CWA, subject, however, to modification by the Court upon a proper motion by CWA for such modification and the establishment by CWA at the time of hearing on such a motion that

amounts in excess of such 19% were properly chargeable in the future to the plaintiffs as Agency Fee Payors." The defendants propose that the court refer this matter back to the Special Master to enable them to produce evidence to modify the percentage figure for future injunctive relief.

In Judge Blair's order of March 16, 1979, the burden of proving the proportion of expenditures properly chargeable as an agency fee was placed on the union defendants. Within this framework, the Special Master disallowed many of defendant CWA's expenditures since the unions failed to meet their burden of showing that those expenses were attributable to collective bargaining, contract administration, or grievance adjustment activities. In many instances, expense items were wholly disallowed because the unions' record-keeping procedures failed to establish the portion of that expense which should be allocated to chargeable activities.[1] The defendants now seek to present evidence to the Special Master of modified bookkeeping procedures which would enable the unions to establish more accurately the percentage of expenditures on collective bargaining, contract administration, and grievance adjustment. The defendants argue that future injunctive relief should reflect this modified percentage figure.

Judge Blair's Order of March 16, 1979, succinctly set forth the relief to which the plaintiffs are entitled as follows:

"Thus it appears that the plaintiff agency fee payers are entitled to a declaratory judgment that exaction of fees for activities other than 'collective bargaining, contract administration and grievance adjustment' is im-

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[1] As an example, staff salary expenses were disallowed since the union records failed to provide any basis for a reliable estimate of the portion of time the individual staff workers spent on collective bargaining, contract administration or grievance adjustment activities.

proper, a decree ordering restitution of the amounts improperly collected by the union in the past, and an injunction against future amounts authorized by the agency shop in excess of the amount necessary for the three enumerated purposes."

This case was referred to the Special Master for a specific findings of the percentage amounts improperly collected from the plaintiffs in the past. The injunctive relief regarding future collections should, however, be more flexible in order to accommodate possible changes in the unions' procedures. If at all possible, the final injunction should contain a self-executing procedure which will enable the allowable percentage figure to fluctuate in order to reflect current union spending policies. This procedure will avoid the necessity of locking the court into the role of overseeing the unions' activities on a permanent basis.

[2] Given the Special Master's familiarity with the detailed factual record in this case, the court believes that the issue of framing future injunctive relief will be handled most expeditiously if addressed in the first instance by the Special Master. On remand, therefore, the Special Master should submit additional findings on the following issues:

(1) Do the unions' current record-keeping policies in any way alter the factual findings previously submitted to the court?

(2) If so, what method of computation would most accurately reflect the percentage of fees collected which are properly allocable to permissible activties?

(3) In what manner, if at all, may this computation procedure be made self-executing in order to compensate for future changes in union policies?

(4) How should the final injunction be framed in order to accomplish the objection set forth in this order and the prior orders in this action?

The Special Master may hold additional evidentiary hearings limited to the issues raised in the above questions. The parties may also engage in additional discovery, in accordance with the rulings of the Special Master, limited strictly to these issues.

C. *Clerical Errors*

The defendants have noted two apparent clerical errors in the Special Master's report. In Appendix D, i.e., the list of administrative expenses which were held to be permissible, the $416,000 figure listed as "Development and Research" should have been labeled "Other Headquarters". Similarly, the $24,000 figure listed as "Professional Fees" should have been labeled "Staff Moves." (Refer to Appendix A-2). Since this matter is being referred back to the Special Master for other clarifications, it seems appropriate to ask that the Special Master also indicate whether these labeling errors in any way effect his findings in this case.[2]

II. *Conclusion*

It is ORDERED this 19th day of January, 1981, by the United States District Court for the District of Maryland as follows:

(1) Defendants' Motion to Recommit this Matter to the Special Master (Paper 118) is GRANTED;

(2) This action will be referred back to Special Master Wilson K. Barnes, pursuant to the provisions of Fed. R. Civ. P. 53(e);

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[2] The plaintiffs indicate that the parties agreed that the $146,000 figure, however labeled, is a permissible administrative expense. With regard to the $24,000 figure, the plaintiffs contend that the Special Master would have disallowed the figure had he considered it a deduction for "staff moves" rather than for "professional fees". This appears to be true if the defendants failed to establish that the moves were in any way related to or necessitated by activities connected with the three permissible purposes.

(3) Special Master Barnes shall file a supplemental report within ninety (90) days, in accordance with the opinions set forth in this Memorandum and Order;

(4) If the parties are unable to agree upon an equitable allocation of costs of the re-reference, the court will then direct the master to make findings of fact and recommendation with respect to the apportionment of costs as between the parties which the court may adopt.

(5) The Clerk shall mail a copy of this Memorandum and Order to the Special Master and counsel.

APPENDIX G

UNITED STATES DISTRICT COURT
D. MARYLAND

Civ. No. B-76-839

HARRY E. BECK, JR., *et al.*

v.

COMMUNICATIONS WORKERS OF AMERICA (C.W.A.), *et al.*,

March 16, 1979

MEMORANDUM AND ORDER

BLAIR, District Judge.

This is an action brought against the Communications Workers of America (CWA) by twenty individuals who pay "agency fees" to that union and its various Maryland locals. The complaint alleges, in essence, that the defendant union has collected and continues to collect from the plaintiffs monies in excess of the amount actually allocable to expenses incurred in connection with collective bargaining, contract administration and grievance adjustment in violation of plaintiffs' first amendment rights.

This court held by Memorandum and Order of January 12, 1979, 468 F. Supp. 87 (D. Md. 1979), that the plaintiffs would not be required to exhaust internal union procedures prior to seeking a judicial determination of their rights. The court also determined at that time that

the case was appropriate for declaratory judgment, but decided to confer informally with counsel prior to issuing its judgment. Since that time, the defendant has raised two issues which must be decided before judgment in the case may be entered.

The first is whether the plaintiffs have standing to challenge the CWA procedure at all, since, by their own admission, they never invoked the rebate procedure and, according to the defendant, several of them failed to direct formal letters of protest to the union prior to filing the complaint in this case.[1] This court finds that the plaintiffs do have standing to bring this action.

The requirement that objectors voice their protest was set out in *International Association of Machinists v. Street*, 367 U.S. 740, 774, 81 S.Ct. 1784, 1803, 6 L.Ed.2d 1141 (1961) in which the Court stated that relief in such a case "would properly be granted only to employees who have made known to the union officials that they do not desire their funds to be used for political causes to which they object." The Court enlarged upon this statement in *Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees v. Allen*, 373 U.S. 113, 119 n.6, 83 S.Ct. 1158, 1162, 10 L.Ed.2d 235 (1963), when it stated:

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[1] This court notes that the defendant has taken a somewhat ambivalent position throughout this litigation vis-a-vis the standing of the plaintiffs. CWA filed a serious motion to dismiss or in the alternative to stay the proceedings pending plaintiffs' exhaustion of the internal union rebate procedure, which was denied by Memorandum and Order of this court. January 12, 1979, 468 F.Supp. 87 (D.Md. 1979). In its motion, CWA asserted that several of the plaintiffs had invoked the procedure and should be required to exhaust, and that others who had not invoked the procedure should be dismissed for lack of standing. More recently, in its Motion for Reconsideration, etc. (*see* infra at 95) CWA states at 2, 4 that "[a]ll plaintiffs are considered to have invoked the procedure for all years since 1976."

> Respondents first made known their objection to the petitioners' political expenditures in their complaint filed in this action; however, this was early enough.

Thus, it is clear that the law does not require an affirmative demonstration of protest as a condition precedent to bringing suit. All that is required is that the individual dissenter make known his position so that, in fairness to the union, no one who does *not* object to the union's political expenditures is able to secure relief. *Street, supra*, 367 U.S. at 774, 81 S.Ct. 1784; *Allen, supra*, 373 U.S. at 119, 83 S.Ct. 1158. In the instant case, the plaintiffs unequivocally made known their protest by filing suit. As in *Allen, supra*, that is "early enough." Accordingly, defendant's motion to dismiss for lack of standing will be denied.

Second, CWA has recently moved this Court to reconsider its Memorandum and Order of January 12, 1979 or, in the alternative, to certify an interlocutory appeal under 28 U.S.C. § 1292(b). In its motion for reconsideration, the defendant relies upon *Reid v. United Auto Workers*, 479 F.2d 517 (10th Cir.), *cert. denied*, 414 U.S. 1076, 94 S.Ct. 572, 38 L.Ed.2d 483 (1973), and *Seay v. McDonnell Douglas Corp.*, 371 F. Supp. 754 (C.D. Cal. 1973), *aff'd in part, reversed in part*, 533 F.2d 1126 (9th Cir. 1976), and asserts that CWA's "Partisan Politics-Policy" (copy appended to January 12 Memorandum and Order, 468 F. Supp. at 92, is in every respect satisfactory and that the plaintiffs should be required to exhaust internal union remedies. The defendant union has not brought to the court's attention any material which was not previously considered in connection with the motion to dismiss or to stay pending exhaustion. This court considered carefully the applicability of both *Reid* and *Seay* but concluded that in this case, it would not be helpful to require the plaintiffs to invoke and exhaust the union's rebate procedure. The decision to grant or deny a stay is a discretionary one, 1 C.J.S. Actions § 133, and this

court is satisfied that the exercise of its discretion was sound. Since the defendant has cited no auhtority which the court has not long had before it, and for the reasons already stated, the motion to reconsider the Memorandum and Order of January 12, 1979 will be denied.

In the alternative, the defendant has moved this court to certify an interlocutory appeal under 28 U.S.C. § 1292(b). That section provides for such an appeal where an otherwise non-appealable order involves a controlling question of law as to which there is substantial ground for difference of opinion and which, if resolved, may materially advance the ultimate termination of the litigation. Section 1292(b), a narrow exception to the longstanding rule against piecemeal appeal, is limited to exceptional cases. *Milbert v. Bison Laboratories*, 260 F.2d 431, 433 (3d Cir. 1958); *Gottesman v. General Motors Corp.*, 268 F.2d 194, 196 (2d Cir. 1959). This court is not of the opinion that this is an issue which requires application of the statute: it involves neither a "controlling question of law," nor would an interlocutory appeal "materially advance the ultimate termination of [this] litigation."

The question decided by this court in its January 12, 1979 Memorandum and Order was whether, under the facts of the case, it should stay proceedings and require the plaintiffs to exhaust the internal union rebate procedure prior to seeking judicial determination of what proportion of their "agency fees" could properly be collected by the union. This court found guidance in the Supreme Court's remark that a stay in such a case is "not strictly required by any doctrine of exhaustion of remedies," *Abood v. Detroit Board of Education*, 431 U.S. 209, 242, 97 S.Ct. 1782, 1803, 52 L.Ed.2d 261 (1977), and determined, under facts peculiar to this case, that a stay would not promote resolution of this controversy. As noted above, the decision to deny the stay was within the discretion of the court. It involved more a question of

fact than one of law; it certainly did not call into issue a "controlling question of law as to which there is substantial ground for difference of opinion" as required by 28 U.S.C. § 1292(b). The language and spirit of the section indicate that a discretionary decision such as this one ought not be treated as a controlling question of law. *J. C. Trahan Drilling Contractor, Inc. v. Sterling*, 335 F.2d 65, 66-67 (5th Cir. 1964).

Second, and more important, it does not appear that an immediate appeal would promote the termination of the litigation. This court denied the requested stay for the express reason that it did not appear that exhaustion of the CWA rebate procedure would in any way move the case toward resolution. See Memorandum and Order of January 12, 1979, 468 F. Supp. at 91 (D.Md. 1979). The amount of time necessary for the series of judicial and intra-union hearings and appeals contemplated by the defendant's motion for certification under § 1292(b) would better be calculated in years rather than months, and, in all likelihood, at the end of it all, this court would be called upon to make the determination it is now prepared to make. *Cf., e.g., Gottesman, supra*, 268 F.2d at 197. Accordingly, the defendant's motion to certify an interlocutory appeal under 28 U.S.C. § 1292(b) will be denied.

The above outstanding issues having been resolved, there remains for this court the task of declaring its judgment as to the rights and obligations of the parties. This case presents an actual controversy within the jurisdiction of this court and the appropriate pleadings have been filed; accordingly, declaratory judgment is proper. 28 U.S.C. § 2201.

It is clear that in both the private and the public sectors, workers who are not union members may be obliged to pay "agency fees" to the recognized labor union as a condition of employment when the union-management contract requires such payments. *NLRB v. General*

Motors Corp., 373 U.S. 734, 735, 83 S.Ct. 1453, 10 L.Ed.2d 670 (1963); *Oil, Chemical and Atomic Workers International Union, AFL-CIO v. Mobil Oil Corp.*, 426 U.S. 407, 409 and n.1, 96 S.Ct. 2140, 48 L.Ed.2d 736 (1976). It is equally clear that labor organizations may not collect and disburse such "agency fees" for purposes other than "collective bargaining, contract administration, and grievance adjustment" without seriously implicating the first amendment rights of free speech and association of fee payors who object. *Abood v. Detroit Board of Education*, 431 U.S. 209, 225-26, 232 and 235-36, 97 S.Ct. 1782, 1794, 52 L.Ed.2d 261 (1977).

In this case it is undisputed that the defendant union, CWA, has negotiated an "agency shop" clause with the plaintiffs' employers which allows the union to collect dues-equivalent payments from the plaintiffs. *See* Exhibits A-1 and A-2 to the Complaint. It is also clear that the plaintiffs object to the expenditure of their funds for purposes other than "collective bargaining, contract administration, and grievance adjustment." Finally, it is undisputed that CWA has spent and continues to spend an as yet undetermined fraction of its dues receipts and dues-equivalent agency receipts for purposes other than the three numerated ones.

Thus it appears that the plaintiff agency-fee payors are entitled to a declaratory judgment that exaction of fees for activities other than "collective bargaining, contract administration and grievance adjustment" is improper, a decree ordering restitution of the amounts improperly collected by the union in the past, and an injunction against future collection of amounts authorized by the agency shop clause in excess of the amount necessary for the three enumerated purposes. *Allen, supra*, 373 U.S. at 122, 83 S.Ct. 1158; *Street, supra* at 774, 81 S.Ct. 1784. This relief necessarily requires a determination of what proportion of the union's total expenditures is attributable to activities other than collecive bargain-

ing, contract administration and grievance adjustment. *Street, supra*, 367 U.S. at 775, 81 S.Ct. 1784; *Allen, supra* at 121, 83 S.Ct. 1158. The burden of proving such proportion rests upon the union, but "[a]bsolute precision in the calculation of such proportion is not, of course, to be expected or required," *Allen, supra* at 122, 83 S.Ct. at 1163.

Accordingly, it is the judgment of this court, to be set forth separately by the Clerk as required by Fed. R. Civ. P. 58, that:

(1) Pursuant to the agency shop clause in its collective bargaining agreement with plaintiffs' employers, the defendant, CWA, has collected and continues to collect from the plaintiffs amounts beyond that allocable to collective bargaining, contract administration and grievance adjustment;

(2) That such collection by the defendant violates the first amendment rights of the plaintiffs;

(3) That the parties may agree upon the percentage of the defendant's budget disbursed for purposes other than the three permissible ones;

(4) That if, at the expiration of thirty (30) days from the date of this Order, the parties remain unable so to agree, then, pursuant to Fed.R.Civ.P. 53, the matter will be referred to a master of the parties' own choosing;

(5) That if, at the expiration of ten (10) days from that date, the parties are unable to agree upon a master, then this court will appoint a master;

(6) That in the event of reference to a master, of either the parties' or the court's choosing, if the parties are unable to agree upon an equitable allocation of the costs of the reference, then this court will direct the master to make findings of fact and recommendations with respect to the apportionment of costs as between the parties which the court may adopt;

7) That when it has been determined what portion of the agency fees the defendant has collected improperly, the defendant is to refund to each plaintiff for every year since January 1, 1976 an amount reflecting that portion of his dues-equivalent agency fees which was spent for purposes other than collective bargaining, contract administration and grievance adjustment; and

(8) The provisions of this Order are expressly conditioned upon the plaintiffs' dismissing the AFL-CIO and its named affiliates from this action, as counsel for the plaintiffs represented informally they would do upon entry of this Order.

It is SO ORDERED.

It is further ORDERED that:

(1) Defendant's motion to dismiss for lack of standing be, and the same hereby is, DENIED.

(2) Defendant's motion for reconsideration be, and the same hereby is, DENIED; and

(3) Defendant's motion to certify an interlocutory appeal under 28 U.S.C. § 1292(b) be, and the same hereby is, DENIED.

APPENDIX H

UNITED STATES DISTRICT COURT
D. MARYLAND

Civ. No. B-76-839

HARRY E. BECK, JR., *et al.*

v.

COMMUNICATIONS WORKERS OF AMERICA (C.W.A.), *et al.*

Jan. 12, 1979

MEMORANDUM AND ORDER

BLAIR, District Judge.

Plaintiffs, twenty individuals employed by various Maryland subsidiaries of American Telephone and Telegraph Company (AT&T) and the Chesapeake and Potomac Telephone Company (C&P) and subject to collective bargaining agreements between the employers and the defendant union, Communication Workers of America (CWA),[1] are not members of the defendant union or of any labor organization. They are "agency fee payors"; that is, they are required to pay to the union as a condition of employment an amount equal to periodic union dues and assessments, so that they do not share in benefits secured by collective bargaining without shar-

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[1] The plaintiffs' employers, AT&T and C&P, were also named originally as parties defendant. By Memorandum and Order of April 13, 1977, this court granted the employers' motions to dismiss. Accordingly, the Union (CWA) and its subsidiary locals and committees are the only remaining defendants and are hereafter referred to collectively as "defendant" or "Union" or "CWA."

ing the cost. This "agency shop" arrangement is not prohibited by Section 8(a)(3) of the Taft-Hartley Act, 29 U.S.C. § 158(a)(3) and has consistently been upheld by the United States Supreme Court. *NLRB v. General Motors Corp.*, 373 U.S. 734, 735, 83 S.Ct. 1453, 10 L.Ed.2d 670 (1963); *Oil Chemical & Atomic Workers International Union, AFL-CIO v. Mobil Oil Corp.*, 426 U.S. 407, 409 and n.1, 96 S.Ct. 2140, 48 L.Ed.2d 736 (1976).[2]

The plaintiffs do not challenge the validity of the agency shop but bring this action seeking, *inter alia*, to enjoin enforcement of CWA's agency shop provision insofar as the fees collected from the plaintiffs are allegedly used for non-collective bargaining purposes. The plaintiffs allege in substance that their coerced contributions are used to support lobbying efforts and political campaigns which plaintiffs oppose in violation of plaintiffs' right under the first amendment to express themselves freely, and without prior restraint.[3]

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[2] Section 14(b) of the National Labor Relations Act permits the states individually to prohibit such union-security agreements. 29 U.S.C. § 164(b). *Retail Clerks v. Schermerhorn*, 373 U.S. 746, 757, 83 S.Ct. 1461, 10 L.Ed.2d 678 (1963) and *Retail Clerks v. Schermerhorn*, 375 U.S. 96, 103, 84 S.Ct. 219, 11 L.Ed.2d 179 (1963), but Maryland has not seen fit to do so.

[3] The plaintiffs oppose, in fact, the expenditure of agency funds for *any* purposes not directly related to collective bargaining, not just those primarily political in nature. They oppose, for example, expenditures for union social functions, maintenance of strike benefit funds, and scholarship funds, *inter alia*. Complaint ' 16. While not denying that these expenditures may raise serious questions, for the purposes of this motion, it is sufficient to consider only the allegation that the Union is collecting and disbursing agency funds for political purposes which the plaintiffs oppose.

This court reserves for decision at a later date the question whether the Union may spend the plaintiffs' fees for any or all of the non-collective bargaining purposes complained of, noting that there does appear to be, in the decisions of the Supreme Court on the subject, a gray area between expenditures for "political

If the Union is, as alleged, spending fees exacted pursuant to the agency shop arrangement in support of ideological activities to which plaintiffs object, such expenditures would, of course, seriously implicate the plaintiffs' fundamental first amendment interests. *Abood v. Detroit Board of Education*, 431 U.S. 209, 234, 237, 97 S.Ct. 1782, 52 L.Ed.2d 261 (1977) *and see Buckley v. Valeo*, 424 U.S. 1, 23, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976). The United States Supreme Court has suggested that labor unions might avoid infringing the first amendment rights of dissenters by establishing internal procedures for determining what proportion of the union budget is allocated to political purposes and then refunding the proportionate amount and excusing dissenting agency-fee payors from "contributing" that amount in the future. *Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees v. Allen*, 373 U.S. 113, 122-23, 83 S.Ct. 1158, 10 L.Ed.2d 235 (1963); *International Association of Machinists v. Street*, 367 U.S. 740, 774-75, 81 S.Ct. 1784, 6 L.Ed.2d 1141 (1961). *See also Abood, supra*, 431 U.S. at 237 n. 34, 240, and n. 41, 97 S.Ct. 1782. Such an internal procedure, the Court supposed, might avert prolonged and expensive litigation. *Allen, supra*, 373 U.S. at 123, 83 S.Ct. 1158.

Allen and the other decisions of the Supreme Court recommending the establishment of an internal union accounting procedure do not expound in detail upon the nature of the procedure required. *Street, supra*, 367

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purposes" which are clearly impermissible and expenditures for "collective bargaining, contract administration, and grievance adjustment," which are, of course, permissible. *Compare Internat'l Assn. of Machinists v. Street*, 367 U.S. 740, 774-75, 81 S.Ct. 1784, 6 L.Ed.2d 1141 (1961) and *Bhd. of Ry. and S. S. Clerks, Freight Handlers, Express and Station Employees v. Allen*, 373 U.S. 113, 121, 83 S.Ct. 1158, 10 L.Ed.2d 235 (1963) *with Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 225-26 and 236 and n. 33, 97 S.Ct. 1782, 52 L.Ed.2d 261 (1977).

U.S. at 775, 81 S.Ct. 1784, states merely that the dissenting employee is entitled to recover an amount proportionate to the fraction of the union budget which is spent on political purposes, although the employee is not required to trace his fees through the union machinery. *Allen, supra*, 373 U.S. at 122, 83 S.Ct. 1158, established that the union which collects and disburses the agency fees bears the burden of determining the correct proportion:

> Since the unions possess the facts and records from which the proportion of political to total union expenditures can reasonably be calculated, basic considerations of fairness compel that they, not the individual employees, bear the burden of proving such proportion.

373 U.S. at 122, 83 S.Ct. at 1163.

In *Abood, supra*, 431 U.S. 209, 240, 97 S.Ct. 1782, 52 L.Ed.2d 261, the Court did not enlarge upon the practical proposal described in *Allen*, but did note that the union in that case had adopted an *Allen*-type plan [4] during the pendency of the litigation. The Court remanded the case to the state court and in doing so suggested that

> [i]n view of the newly adopted Union internal remedy, it may be appropriate under Michigan law even if not strictly required by any doctrine of exhaustion of remedies, to defer further judicial proceedings pending the voluntary utilization by the parties of that internal remedy as a possible means of settling the dispute.

431 U.S. at 242, 97 S.Ct. at 1803. The Court, in a footnote, declined to express an opinion as to the constitutional sufficiency of the internal remedy, and noted that

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[4] The union procedure in *Abood* is described at 431 U.S. 240 n. 41, 97 S.Ct. 1782. The union initially calculates the proportion of political expenditures, but its determination is subject to review by an impartial board.

if the employees concluded, after having exhausted, that the internal procedure was deficient, they would then be entitled to a judicial consideration of the adequacy of the remedy. The defendant Union [5] in this case has instituted an internal rebate procedure and has moved to dismiss or in the alternative to stay [6] these proceedings pending plaintiffs' exhaustion of the internal union remedy.

The plaintiffs contend that they should not be required to exhaust the internal union remedy prior to resort to judicial consideration. They assert that, in the first instance, internal union procedures are not applicable to those who are not members and, in any event, the CWA procedure is insufficient in many respects to safeguard the plaintiffs' constitutional rights. It is apparently the plaintiffs' contention that, contrary to the clear mandate of *Allen*, the determination which expenditures are political and which are permissible should under no circumstances be left to the union. They urge

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[5] The procedure adopted by CWA is set out in a resolution of the Executive Board effective July 1, 1974, entitled "Partisan Politics—Policy," a copy of which is attached hereto as Appendix. The policy provides that any member or non-member covered by a union-security agreement who objects to "the expenditure of a portion of dues or agency fees for activities or causes primarily political in nature" is entitled to a refund. The Administrative Committee of the Executive Board determines the approximate proportion of dues or fees attributable to political activity. If the payor objects to the amount calculated by the Administrative Committee, he may appeal to the Executive Board of the Union. There is a further and final appeal to the Convention. There is no provision in the policy for review by an impartial body.

[6] The defendants moved to dismiss the claims of those plaintiffs who have not invoked the CWA rebate procedure and to stay proceedings with respect to those who have invoked it. There is a factual dispute as to whether any of the plaintiffs invoked the procedure. Since this court is of the opinion that exhaustion of the union remedy will not be required in this case as a condition precedent to litigation, it is unnecessary to determine which, if any, of the plaintiffs invoked the procedure.

that only an Article III court may decide an issue which goes to the plaintiffs' fundamental first amendment rights.

Since this court has determined that on the facts of this case, exhaustion will not be required, it is unnecessary to reach the numerous constitutional issues the plaintiffs raise. The defendants' request for a stay pending exhaustion will be denied solely for the reason that it appears from the record to date that exhaustion would not promote settlement of the disputes and would cause unnecessary delay.

Although the Supreme Court has, as noted, demonstrated a preference for internal union procedures as an alternative to costly litigation, *Allen*, *supra*, 373 U.S. at 123, 83 S.Ct. 1158, *Abood*, *supra*, 431 U.S. at 240, 97 S.Ct. 1782, it does not appear that a stay is "strictly required by any doctrine of exhaustion of remedies." *Id.* at 242, 97 S.Ct. at 1802. The Court in *Abood* counseled that exhaustion in that case might afford "a possible means of settling the dispute." [7]

A stay, generally speaking, is a matter of convenience, not of right, and may be granted or denied in the exercise of the sound discretion of the court. The grounds upon which a stay of proceedings may be granted or denied on the facts and circumstances in each particular case. *See generally* 1 C.J.S. Actions §§ 131-137. In this case, a stay pending exhaustion of the union rebate procedure would not be helpful in promoting the ultimate resolution of the controversy. It is extremely unlikely that exhaustion will substantially alter the positions of the parties. For one thing, it is not completely clear from the proceedings to date that the union's rebate is proce-

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[7] This court notes that, on remand, the Michigan Court of Appeals, for reasons of its own, did not require exhaustion as a condition precedent to litigation. *Ball v. City of Detroit*, 84 Mich.App. 383, 269 N.W.2d 607 (1978).

durally or substantially adequate. The plaintiffs will almost certainly be dissatisfied with the Union's determination of the amount of dues-equivalent payments to be refunded,[8] if for no other reason than that the CWA procedure, unlike the union's procedure in *Abood*, provides for no review by an impartial party. *See also, e.g.*, Plaintiffs' Offer of Proof, Court Paper No. 46, which details the numerous defects the plaintiff's expect to encounter in the rebate procedure. Since the court has already been called upon to determine the sufficiency of the rebate procedure, and not merely to review the calculations of an accountant, it appears that only delay will result from requiring the plaintiffs to negotiate all three levels of the CWA plan before challenging it. There may, of course, be cases in which exhaustion is appropriate, but this is not one of them.

Accordingly, for the reasons stated, defendant's motion to dismiss or in the alternative to stay these proceedings pending exhaustion of the internal union remedy will be denied.

The plaintiffs have moved for summary judgment on Count VI of the Complaint. This court seeks essentially a declaratory judgment that the defendants may not raise as an affirmative defense the fact that this litiga-

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[8] In this case, certain, if not all of the plaintiffs directed form letters to the Union protesting the expenditure of their funds for non-collective bargaining purposes. In at least three cases, the Union recipient, Mr. James R. Pizzano, understood the purpose of the letters to be to invoke the rebate provision of the "Partisan Politics—Policy." Accordingly, the Union's accountant was directed to determine what percentage of the dues receipts for the fiscal year ending in March 1976 was attributable to "political and legislative programs." The accountant determined that the correct percentage was 5.78%, yielding a per capita refund of $2.95. *See* Affidavit of James R. Pizzano, attached to Defendant's Motion to Dismiss. Court Paper No. 36. The plaintiffs have already asserted that the Union's arithmetic is incorrect (although they deny that they invoked the procedure).

tion is financed in whole or in part by the National Right to Work Legal Defense Foundation, in possible contravention of 29 U.S.C. § 411(a)(4) (1970). It is sufficient to note that over the two-year history of this litigation, no defendant has ever raised this defense. It follows that there is no ripe "case or controversy" on this point, and it would exceed this court's power to issue the prayed-for declaration. *United Public Workers of America v. Mitchell*, 330 U.S. 75, 89, 67 S.Ct. 556, 91 L.Ed. 754 (1947). Accordingly, plaintiffs' motion for summary judgment will be denied.

It is this 12th day of January, 1979, by the United States District Court for the District of Maryland, ORDERED:

1. That the defendant's motion to dismiss or in the alternative to stay these proceedings be, and the same hereby is, DENIED; and

2. That plaintiffs' motion for summary judgment as to Count VI of the Complaint be, and the same hereby is, DENIED.

APPENDIX

The following policy statement was read and discussed by the Board. It concerns members or non-members who may be covered by a collective bargaining agreement containing a "Union Shop" or "Agency Shop" provision and who may object to that portion of dues or agency fees which may be used for political activities.

PARTISAN POLITICS—POLICY

Effective *July* 1, 1974, the following policy is hereby established:

1. Any member or nonmember who is covered by a collective bargaining agreement containing a "Union Shop" or "Agency Shop" provision shall have the right to object to the expenditure of a portion of dues or agency fees for activities or causes primarily political in nature, and shall be entitled to the refund of a portion of such dues under the terms, conditions and procedures contained in this statement of policy.

2. The Administrative Committee of the Executive Board shall determine the appropriate annual proportion of dues or agency fees spent for activities or causes primarily political in nature as of March 31st of each year.

3. A member or nonmember may express objection to the Secretary-Treasurer of the Union by written notification by registered or certified mail. Such objection must be received by the Secretary-Treasurer (postmarked) during the first fourteen (14) days of Union membership or agency association or during fourteen (14) days following each anniversary of Union membership or agency association. Each such individual written objection will be only for the current year in which the objection is made. An objection may be continued from year to year by individual notifications, during each annual anniversary of

membership or agency association and the following fourteen (14) days.

4. If the member or nonmember is not satisfied with the allocation determination of the Administrative Committee of the Executive Board, there shall be a right of appeal to the Executive Board of the Union. Such an appeal must be made in writing to the President of the Union by certified or registered mail and must be made within thirty (30) days from the date of notification or publication of the Administrative Committee's determination.

5. If the member or nonmember does not accept the decision of the Executive Board, there shall be a right of appeal to the Convention. Such appeal must be postmarked within fifteen (15) days of receipt of the decision of the Executive Board. Such notificatio nshall be in writing to the President and shall be sent by registered or certified mail.

6. The portion of Union dues or agency fees to be refunded for policy purposes to an objector shall be based on the amount determined to be allocable by the Administrative Committee, or any amendment thereof on appeal. The rebate to the member or nonmember will be based on the annual dues received for the current year in which the objection is received.

Motion: Moved that the above statement be adopted.

Motion adopted
6/19/74

FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

NATIONAL LABOR RELATIONS ACT
29 United States Code

§ 157. Right of employees as to organization, collective bargaining, etc.

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

§ 158. Unfair labor practices
(a)Unfair labor practices by employer

It shall be an unfair labor practice for an employer—

* * * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this subchapter, or in any other statute of the United States, shall pre-

clude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this subsection as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 159(a) of this title, in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 159(e) of this title within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: *Provided further*, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership * * *.

§ 159. Representatives and elections
(a) Exclusive representatives; employees' adjustment of grievances directly with employer

Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees

in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided*, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: *Provided further*, That the bargaining representative has been given opportunity to be present at such adjustment.

RAILWAY LABOR ACT
45 United States Code

§ 152. General duties

* * * * *

Fourth. Organization and collective bargaining; freedom from interference by carrier; assistance in organizing or maintaining organization by carrier forbidden; deduction of dues from wages forbidden

Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this chapter. No carrier, its officers, or agents shall deny or in any way question the right of its employees to join, organize, or assist in organizing the labor organization of their choice, and it shall be unlawful for any carrier to interfere in any way with the organization of its employees, or to use the funds of the carrier in maintaining or assisting or contributing to any labor organi-

zation, labor representative, or other agency of collective bargaining, or in performing any work therefor, or to influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization, or to deduct from the wages of employees any dues, fees, assessments, or other contributions payable to labor organizations, or to collect or to assist in the collection of any such dues, fees, assessments, or other contributions: *Provided*, That nothing in this chapter shall be construed to prohibit a carrier from permitting an employee, individually, or local representatives of employees from conferring with management during working hours without loss of time, or to prohibit a carrier from furnishing free transportation to its employees while engaged in the business of a labor organization.

* * * * *

Eleventh. Union security agreements; check-off

Notwithstanding any other provisions of this chapter, or of any other statute or law of the United States, or Territory thereof, or of any State, any carrier or carriers as defined in this chapter and a labor organization or labor organizations duly designated and authorized to represent employees in accordance with the requirements of this chapter shall be permitted—

(a) to make agreements, requiring, as a condition of continued employment, that within sixty days following the beginning of such employment, or the effective date of such agreements, whichever is the later, all employees shall become members of the labor organization representing their craft or class: *Provided*, That no such agreement shall require such condition of employment with respect to employees to whom membership is not available upon the same terms and conditions as are

generally applicable to any other member or with respect to employees to whom membership was denied or terminated for any reason other than the failure of the employee to tender the periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership.

* * * * *

No. 86-966

IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

HARRY E. BECK, JR., *et al.*,
Petitioners,

v.

COMMUNICATIONS WORKERS OF AMERICA, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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MEMORANDUM OF THE RESPONDENT

THOMAS ADAIR
JAMES COPPESS
1925 K Street, N.W.
Washington, D.C. 20006
(202) 728-2462

DAVID M. SILBERMAN
LAURENCE GOLD
(Counsel of Record)
815 16th Street, N.W.
Washington, D.C. 20006
(202) 637-5390

Of Counsel:
GEORGE KAUFMANN
2101 L Street, N.W., Suite 1000
Washington, D.C. 20037
(202) 296-1294

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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IN THE

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MEMORANDUM OF THE RESPONDENT

The petition for certiorari uses several different formulations to raise a single question, *see* Pet. at i:

> the injunction the District Court devised, and the Court of Appeals approved, to prevent the illegal exaction of 'agency fees' from petitioner nonunion employees by respondent Communications Workers of America ["CWA"] . . . fail[s] to meet the procedural requirements for 'agency-fee' arrangements this Court established in *Chicago Teachers Union, Local No. 1 v. Hudson*, —— U.S. ——, [54 L.W. 4231 (March 4, 1986)].

As we show below, that question does not merit plenary consideration by this Court at this time for two independent reasons.

First, because *Hudson* is of such recent vintage, neither the courts below, nor any other federal court, have had the opportunity to consider whether the rules announced in *Hudson* to govern the procedures used in collecting agency fees in the public sector apply to injunctive relief for individually-named plaintiffs challenging the application to them of an agency fee requirement in a privately-negotiated collective bargaining agreement in an industry covered by the National Labor Relations Act, as amended, 29 U.S.C. §§ 151, *et seq.* ("NLRA"). Nor have the courts below in this case had the occasion to decide whether, if *Hudson* applies, the new rules announced therein require modification of the district court's injunction.

Second, the question plaintiffs posed in the certiorari petition presupposes that the "exaction of agency fees" from the plaintiffs here is "illegal." That precise issue is raised by CWA's certiorari petition from the decision below (No. 86-637). The Court's disposition of that petition could moot or significantly affect the issue raised in the petition here. Indeed, it is impossible to discuss in a reasoned way what procedural requirements CWA must meet in collecting agency fees until it is first determined whether any substantive constraints are placed on CWA in this regard, and, if so, the source of such constraints.

1. (a) On August 9, 1983, the district court entered the order and injunction which is the source of plaintiffs' challenge. *See* Pet. App. 107a-09a. Finding that plaintiffs could not lawfully be required to pay full dues to CWA despite the union security provision in CWA's collective bargaining agreement with AT&T and C&P Telephone, the district court "enjoined [CWA] from retaining . . . from the plaintiffs . . . the amount certified as non-retainable by an independent Certified Public Accountant . . . who has used the system of record keeping and alloca-

tions designed by the experts of CWA [and approved by the Court]." *Id.* at 108a. The injunction provides for judicial review, at plaintiff's behest, of the auditors' annual determination of the "non-retainable" amount. *Id.* at 108a-09a. And the injunction further requires CWA "each fiscal year [to] hold in an interest-bearing escrow account, a portion of the agency fees paid by each plaintiff equal to twice the amount determined in the previous-fiscal year to be non-retainable." *Id.* at 109a.

On October 24, 1985, a panel of the Fourth Circuit affirmed this injunction in all relevant respects. Rejecting CWA's appeal, the panel agreed with the district court that the union security clause which conditioned plaintiffs' continued employment on the payment of full dues to CWA violated plaintiffs' First Amendment rights, and the panel also found that clause violative of plaintiffs' rights under § 8(a)(3) of the NLRA, 29 U.S.C. § 158 (a)(3). But rejecting plaintiffs' cross-appeal, the panel found the injunction to be proper, reasoning that it "complies with the mandate of *Ellis* [*v. Railway Clerks*, 466 U.S. 435 (1984)]". Pet. App. 81a. The panel explained, *id.* at 82a:

> Under the injunction prescribed by the district court, CWA will be unable to "commit dissenters funds to improper uses even temporarily" because the escrow account is not subject to CWA control. Consequently, the permanent injunction prescribed by the district court adequately protects plaintiffs' rights because CWA will derive no benefit from the amount determined to be non-retainable.[33] *Hudson v. Chicago Teachers Union Local 1*, 743 F.2d 1187, 1197 (7th Cir. 1984).

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[33] Plaintiffs further contend that only an advance reduction approach can adequately protect their statutory rights. This contention, however, is without merit, for the Supreme Court in *Ellis* expressly sanctioned either an advance reduction *or* an interest bearing escrow account approach. Either approach is adequate because each prevents a union from extracting a forced loan from non-consenting payors.

CWA sought rehearing *en banc* of the panel's substantive ruling, *viz.*, the holding that the union security clause violated plaintiffs' rights under the First Amendment and NLRA § 8(a)(3). *Plaintiffs did not request reconsideration of the panel's remedial decision, viz., the affirmance of the district court's injunction.*

The Fourth Circuit granted CWA's suggestion for rehearing *en banc* and received supplemental briefs and held oral argument limited to the issues CWA had raised. On September 12, 1986, the *en banc* court issued a *per curiam* opinion/order announcing that by a vote of 6-4, that court had concluded, albeit without a majority rationale, that the union security agreement was violative of plaintiffs' rights. *See* Pet. App. 1a-6a. *The en banc court did not discuss the propriety of the district court's injunction as that issue was not before it.*

(b) Plaintiffs now contend that the injunction "fails to meet," "violates," and "flies in the face of" *Hudson*, Pet. at 19, 22, 23, and on that basis plaintiffs seek the issuance of a writ of certiorari. But *Hudson* was not decided until March 4, 1986, almost three years *after* the district court issued its injunction, and several months *after* the panel affirmed that injunction. Thus, only the *en banc* court had any opportunity even to consider what relevance, if any, the First Amendment rules announced in *Hudson*—rules the *Hudson* opinion acknowledges the Court "ha[d] not . . . specified in the past," 54 L.W. at 4235 —have in the instant case. And the *en banc* court had no *occasion* to address that issue, as *plaintiffs* did not present the remedial aspects of this case to the *en banc* court for decision.

Accordingly, plaintiffs are asking this Court to decide in the *first instance* questions that were not presented to any court below. That is not the role of this Court.

2. This conclusion is buttressed by the fact that the questions plaintiffs tender not only were not decided

below, but have never been considered by any federal court in any case. Moreover, those questions cannot be considered in a reasoned fashion until the threshold, substantive issues that divided—indeed fractured—the *en banc* court in this case, and that are raised in CWA's petition from the decision below, No. 86-637, are resolved authoritatively.

To begin with, if, as CWA will urge if its certiorari petition were granted and as the Second Circuit concluded in *Price v. Autoworkers*, 795 F.2d 1128 (2d Cir. 1986), *pet. for cert. pending*, No. 86-1055, this Court were to hold that federal law does *not* prohibit private parties in industries covered by the NLRA negotiating and enforcing union security provisions requiring all bargaining unit members to pay full union dues to the bargaining representative, the remedial issues plaintiffs seek to raise in this case would become academic. Plaintiffs' argument here rests on the proposition that "[t]he existence of a substantive limitation on the size of 'agency fees' implies some procedural device adequate to the enforcement of that limitation," Pet. at 17. And plaintiffs are challenging the injunction the district court issued to prevent future violations of plaintiffs' (asserted) right not to support union activities unrelated to collective bargaining. If there is no such right or "substantive limitation" on CWA's collection of full dues from plaintiffs, there would be no warrant for an injunction or other "procedural device" as CWA would be free to collect full dues from all persons the union represents. Thus, this Court's resolution of CWA's petition could effectively moot plaintiffs' petition.

Moreover, even if the Court were to recognize a "substantive limitation" on the freedom of private-sector unions in industries covered by the NLRA to collect agency fees, the source and scope of that limitation could be of determinative importance in assessing the applicability of *Hudson* and, correlatively, in evaluating whether

the injunction the district court entered suffices to prevent future violations of whatever substantive rights this Court recognizes.

If, for example, the Court were to conclude (as did two judges below) that a private union security agreement implicates the state to a degree sufficient to trigger First Amendment requirements, then, of course, the procedures mandated by *Hudson* would be applicable to such arrangements. In that event, the only remaining task would be to determine whether, in the context of this litigation, *Hudson* requires modification of the district court's injunction. That task would appropriately be left to the lower courts.

Four judges below, however, found substantive limitations on CWA's collection of agency fees only in § 8(a)(3) and/or the duty of fair representation, and not in the First Amendment. *Hudson* itself recognizes that "'[p]rocedural safeguards often have a special bite in the First Amendment context.'" 54 L.W. at 4234 n.12. Thus, if this Court were to agree that only statutory, and not constitutional rights are implicated here, *Hudson* would not be directly applicable as *Hudson* states only constitutional rules. In that event, a threshold question of first impression would arise as to whether the escrow procedure mandated by the district court—a procedure which, as the panel below recognized, meets the Railway Labor Act's requirements as set forth in *Ellis*—is adequate to protect plaintiffs' statutory rights under the NLRA.

That question was not decided below and has not been decided by any other federal court, as no other court, either pre- or post-*Hudson*, has read § 8(a)(3) as did five of the judges in the majority below, nor has any court understood the duty of fair representation as did Judge Murnaghan in joining to affirm the district court. Accordingly, the remedial questions that would arise if

this Court were to find a statutory violation are the type of novel questions the Court should not reach out to decide at this time.

CONCLUSION

For the foregoing reasons, the certiorari petition here (No. 86-966) should be held pending a decision on CWA's certiorari petition in No. 86-637. If CWA's petition were granted, action on this petition should be further deferred pending a decision on the merits on the substantive questions raised by CWA; should CWA prevail, plaintiff's petition should be denied as the questions presented by plaintiffs would be moot. If CWA's petition were denied, or if CWA's petition were granted and plaintiffs were to prevail on the merits, the remedial questions raised by this petition should be remanded to the appellate court for decision.

Respectfully submitted,

THOMAS ADAIR
JAMES COPPESS
1925 K Street, N.W.
Washington, D.C. 20006
(202) 728-2462

DAVID M. SILBERMAN
LAURENCE GOLD
(Counsel of Record)
815 16th Street, N.W.
Washington, D.C. 20006
(202) 637-5390

Of Counsel:
GEORGE KAUFMANN
2101 L Street, N.W., Suite 1000
Washington, D.C. 20037
(202) 296-1294

No. 86-966

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

HARRY E. BECK, JR., *et alia*,

Petitioners,

v.

COMMUNICATIONS WORKERS OF AMERICA *et alia*,

Respondents.

On petition for a writ of certiorari to the United States Court of Appeals for the Fourth Circuit

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PETITIONERS' REPLY MEMORANDUM

EDWIN VIEIRA, JR.,
Counsel of Record
13877 Napa Drive
Independent Hill, Virginia 22111
(703) 791-6780

HUGH L. REILLY
National Right to Work Legal Defense Foundation
8001 Braddock Road, Suite 600
Springfield, Virginia 22160
(703) 321-8510

Attorneys for Petitioners

Of Counsel:

JOSEPH J. HAHN
Arvey, Hodes, Costello & Burman
One Eighty North La Salle Street
Chicago, Illinois 60601
(312) 855-5000

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PETITIONERS' REPLY MEMORANDUM

Petitioners Harry E. Beck *et alia* hereby reply to the memorandum of respondent Communications Workers of America (CWA).

ARGUMENT

Both of CWA's contentions that the instant petition "does not merit plenary consideration * * * at this time" [1] border on the ridiculous.

First, CWA charges that petitioners "are asking this Court to decide in the *first instance* questions that were

[1] Memorandum of the Respondent (M) at 1.

not presented to any court below. That is not the role of this Court".[2] Exactly the opposite is true. The issue of the procedural adequacy of the remedy for CWA's violation of Section 8(a)(3) of the National Labor Relations Act was squarely presented to, *and decided by*, the panel of the Court of Appeals.[3] Moreover, in rendering that decision, the panel explicitly rejected petitioners' arguments based on *Hudson* v. *Chicago Teachers Union, Local No. 1*.[4]

Even CWA would not dare to argue that, had this Court never decided *Hudson*, the Court would somehow be impotent to hear petitioners' argument that the Seventh Circuit's decision in *Hudson* demonstrates the erroneous nature of the decision of the Fourth Circuit's panel on the procedural issue. Why this Court's *affirmance* of the Seventh Circuit suddenly creates an impediment to its consideration of this case CWA never explains. Indeed, one would presume that this Court's unanimous support for the Seventh Circuit's decision would strongly counsel the *practical necessity*, not simply the propriety, of plenary review here.

CWA's further canard that petitioners "*did not request reconsideration* [en banc] *of the panel's remedial decision*"[5] is, of course, irrelevant. Seeking reconsideration *en banc* of a decision of a Court of Appeals' panel is not a condition precedent to review by this Court of the panel's decision.

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[2] *Id.* at 4.

[3] Appendix in No. 86-966, at 81a-83a.

[4] 743 F.2d 1187 (7th Cir. 1984), *aff'd*, ____ U.S. ____, 106 S. Ct. 1066 (1986).

[5] M at 4.

Second, CWA complains that "it is impossible to discuss in a reasoned way what procedural requirements CWA must meet in collecting agency fees until it is first determined whether any substantive constraints are placed on CWA in this regard."[6] To be sure, if this Court decides that *no* "substantive constraints" may be imposed on Section 8(a)(3) "agency-fee" schemes, then it will also decide *a fortiori* that there are *no* "procedural requirements [that] CWA must meet", either. And, in that case, no further discussion will be necessary. One cannot, however, simply *assume* that CWA will prevail on the "substantive-constraints" issue. After all, it lost *en banc* in the Court of Appeals. If CWA also loses on that issue here, then necessarily the issue before this Court will be whether the panel was correct in holding that petitioners are not entitled to a *Hudson*-type remedy for CWA's breach of those constraints. If CWA imagines that the content of any conceivable "procedural requirements" varies significantly depending on the mere *basis* of the "substantive constraints"—that is, whether the constraints arise from Section 8(a)(3) itself, from the duty of fair representation, or from the First Amendment—nothing prevents CWA from so arguing.

Petitioners believe that: *1.* The language of Section 8(a)(3) itself imports certain "procedural requirements" as conditions *sine qua non* to the enforcement of an "agency-fee" arrangement. *2.* These "procedural requirements" embody the same common-sense standards to which this Court referred in *Hudson* when it stated that, constitutional considerations aside, "[b]asic considerations of fairness * * * dictate that potential objectors

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[6] *Id.* at 2.

[*i.e.*, nonunion employees such as petitioners] be given sufficient information to gauge the propriety of the union's fee".[7] *3.* These standards compel CWA to provide nonunion employees with the "notice of and opportunity for hearing upon its proposed action" that this Court held the duty of fair representation requires.[8] And *4.*, if common sense, the statute, and the duty of fair representation do not impose the rudimentary safeguards of notice and hearing on CWA's "agency-fee" scheme, then surely the First Amendment does. That is, *whatever* the *source* of the "substantive constraints", the "procedural requirements" necessary to make those constraints effective are the *same*. And, in petitioners' view, the issue before this Court in No. 86-966 is, not "What is the source of the constraints?", but rather "What procedures are required to enforce the constraints, whatever their source?". Moreover, in deciding what the "substantive constraints" are in No. 86-637, this Court will largely determine the procedural requirements necessary to effectuate them—because the precedents governing, and indeed the common sense of, the matter on the substantive side lead to but one reasonable conclusion on the procedural side, too.

Finally, CWA's suggestion that the instant petition (No. 86-966) "be held pending a decision on CWA's * * * petition" (No. 86-637)[9] merely amounts to a demand to permit CWA to prevail in a practical sense not only if it wins on the merits of the "substantive-constraints" issue, but also *even if it loses on that issue*. For, according to

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[7] 106 S. Ct. at 1076.

[8] Steele v. Louisville & N.R.R., 323 U.S. 192, 204 (1944).

[9] Id at 7.

its desires, if CWA loses petitioners nevertheless "should be remanded to the appellate court for decision" on the application of *Hudson* to the issue of what procedural requirements are appropriate—even though the appellate court has already rejected the applicability of the principles of *Hudson* under the circumstances of this case; even though the instant petition is timely and properly raises the procedural issue; and even though that issue is intimately related to, if not logically inextricable from, the "substantive-constraints" issue CWA admits this Court should decide.

Besides needlessly consuming the courts' and the parties' resources in this case, CWA's suggestion would prevent this Court from obviating further costly litigation in other cases on what "procedural requirements" are mandatory for "agency-shop" arrangements under Section 8(a)(3). It passes understanding why this Court should not settle that question now, *once and for all throughout the United States*, simultaneously with settlement of the issue of what the "substantive constraints" are under that section.

CONCLUSION

For the foregoing reasons, this Court should issue writs of certiorari in *both* No. 86-966 *and* No. 86-637,

and order the two cases consolidated for briefing and oral argument.

Respectfully submitted,

EDWIN VIEIRA, JR.,
Counsel of Record
13877 Napa Drive
Independent Hill, Virginia 22111
(703) 791-6780

HUGH L. REILLY
National Right to Work Legal
Defense Foundation
8001 Braddock Road, Suite 600
Springfield, Virginia 22160
(703) 321-8510

Attorneys for Petitioners

Of Counsel:

JOSEPH J. HAHN
Arvey, Hodes, Costello
& Burman
One Eighty North La Salle Street
Chicago, Illinois 60601
(312) 855-5000